# ASSESSING JUDICIAL REVIEW IN THE DOMAIN OF NATIONAL SECURITY.

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**A thesis submitted in fulfilment of the requirements of the degree of Doctor of Philosophy, School of Law, University of Nairobi.**

**July, 2019**

**DECLARATION**

I STEPHEN OUMA G80/98649/2015 declare that this thesis is my original work and has not been submitted elsewhere for the award of a degree or any other award in any other university. Where other people's work, or my own work has been used, this has properly been acknowledged and referenced in accordance with the University of Nairobi requirements.

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I cannot begin to express my gratitude to my immediate and extended family for all the love, support, encouragement and prayers they have sent my way along this journey. I hope that I have made you proud.

Finally, I am grateful to have had the privilege of attending my *alma mater*, the prestigious University of Nairobi. This experience has afforded me the opportunity to work with some of the best and brightest, and the resources for me to achieve great success. Thank you for this opportunity.

## DEDICATION

To my parents Lucas and Mary Awimbo (*nee* Adhiambo). Thank you for teaching me to believe in myself, in God and in my dreams.

To St. Peter's Boys Boarding Primary School, Mumias. Thank you for placing me firmly on the path to my dreams.

## ABSTRACT

Under Chapter Fourteen of the Constitution, the government has an obligation to protect its people, their rights, freedoms, property, peace, stability and prosperity and other national interests. However, some of the strategies employed by the Executive in meeting the obligation to protect have been incompatible with fundamental constitutional principles and the rule of law.

Judicial review of such executive strategies in matters of national security has presented a challenge whenever courts have had to balance the need to protect national security on the one hand and the enforcement of constitutionally enshrined rights of the citizen on the other, within the framework of the obligation to protect. The challenge arises because there is no judicial nor statutory framework for judicial review of national security functions by the Executive.

The common argument that certain aspects of executive conduct while ensuring national security are non justiciable and not amenable to judicial review is analysed and debunked with a finding that national security like other constitutional functions of government is justiciable and a contrary stand would go against Rule of Law. The thesis argues that in a constitutional supremacy regime, judicial review remains central to the doctrine of Rule of Law even as it appreciates executive institutional competence in matters of national security.

While arguing that the imprecise scope of executive authority contributes to the problems that manifest in judicial review of executive conduct in matters of national security, the thesis advocates for a more precise delineation of the margins of executive authority to guide courts on justiciable and non justiciable executive conduct. This would settle once and for all justiciability concerns which frequently arise in judicial review of executive conduct in matters of national security.

A case study of the Security Laws (Amendment) Act No 19 of 2014 illustrates the challenges of balancing executive authority on one hand and constitutionally enshrined rights on the other in the absence of an established constitutional, statutory and judicial framework. The court struck out sections of legislation that would empower the executive to limit certain constitutional rights to ensure national security. The case illustrates that friction between the Judiciary and the executive would be less if there existed a framework for judicial review of national security matters.

The thesis as well advances the proposition that the Constitution has introduced a new order in Article 24(4) under which limitation of rights in cases where national security concerns arise must be objectively justifiable. This supports the argument that the judiciary in ensuring Rule of Law has the constitutional mandate to interpret the Constitution which is the supreme law.

The thesis argues that it would be proper that courts whenever faced with having to review executive conduct should have constitutional, statutory or judicial guidelines that help to strike an appropriate balance between individual human rights and the executive imperative to ensure national security. In the absence of such guidelines, courts have largely made ad hoc and inconsistent decisions that have failed to appreciate Article 24(1) and other opportunities presented by the Constitution.

This thesis ultimately justifies judicial review of executive conduct in matters of national security as superceeding executive plea of non justiciability when it explains how the Judiciary derives its democratic legitimacy from the people through the Constitution, how executive output may not always be legitimate and therefore invite the judiciary to intervene and enforce legitimacy. In proffering a solution to the lacuna of a missing framework for judicial review, the thesis advances the proposition and suggests how Article 24 of the Constitution presents an opportunity to innovatively develop a framework which courts may adopt in judicial review.

**TABLE OF CONTENTS**

DECLARATION ..... i

ACKNOWLEDGEMENT ..... ii

DEDICATION ..... iii

ABSTRACT ..... iv

TABLE OF CONTENTS ..... vi

ABBREVIATIONS ..... xiv

CASES ..... xvi

**CHAPTER ONE:** ..... Error! Bookmark not defined.

**INTRODUCTION.** ..... Error! Bookmark not defined.

1. Nattional security as a constitutional obligation ..... **Error! Bookmark not defined.**

1.1 Constitutional basis of judicial review ..... **Error! Bookmark not defined.**

1.2 Questioning judicial review of national security ..... **Error! Bookmark not defined.**

2. Statement of the Problem: A Missing model for judicial review of national security functions. ..... 11

3. Theoretical/Conceptual Framework ..... 14

3.1 Rule of Law ..... 14

3.2 Separation of Powers ..... 17

3.3 Checks and balances ..... 22

3.4. Constitutional Interpretation ..... 27

3.5. Judicial review ..... 34

4. Literature Review ..... 37

4.1. Expansion of judicial power ..... 37

4.2. Against judicial review ..... 41

4.3. For Judicial review ..... 43

4.4. Judicial Review of National Security Cases ..... 45

5. Research Objectives ..... 49

6. Hypothesis ..... 50

7. Research Questions ..... 50

8. Justification of the study ..... 51

9. Approach and Methodology ..... 52

9.1 Research philosophy. ..... 52

9.2 Research design ..... 53

9.3. Sampling ..... 58

9.4. Data generation and collection methods ..... 58

10. Chapter Outline. ..... 59

**CHAPTER TWO** ..... Error! Bookmark not defined.

**ASCERTAINING THE SCOPE OF JUDICIAL REVIEW** .....Error! Bookmark not defined.

2.1. Introduction ..... 64

2.2. Judicial Review in the Constitution. ..... 65

2.3. Rule of Law ..... 68

2.3.1. Ancient Greece: Aristotle and Plato ..... 70

2.3.2. Ancient Rome: Cicero, *Lex Regia* and the *Corpus Iuris Civilis.* ..... 73

2.3.3. Hobbes, Locke, Rousseau and Montesquieu. ..... 75

2.3.4. Definitional Dilemma ..... 78

2.4. Separation of Powers ..... 81

2.4.1. The Aristotelian Mixed Regime ..... 82
2.4.2. Baron de Montesquieu ..... 88
2.4.3. Definitional Dilemma ..... 91
2.5. Judicial Review ..... 95
2.5.1. Constitutional Judicial Review ..... 95
2.5.2. Statutory Judicial Review ..... 98
2.5.3. Definitional Dilemma ..... 100
2.6. National Security ..... 102
2.6.1. National Security in the Constitution and the National Intelligence Service Act, 2012 ..... 102
2.6.2. Shifting dimensions of national security. ..... 104
2.6.3. Definitional dilemma. ..... 107
2.7. Sources of authority for judicial review. ..... 108
2.8. Significance of judicial review ..... 110
2.8.1. An element of the rule of law ..... 112
2.8.2. An aid to accountability ..... 114
2.8.3. Consistency and precedent ..... 116
2.8.4. An individual right ..... 116
2.9. Scope of judicial review: Introduction. ..... 117
2.9.1. Factors relevant to scope of judicial review ..... 117
2.9.1.1. The structure of the Constitution ..... 117
2.9.1.2. Parliament ..... 118
2.9.2. Scope of judicial Review: Limits. ..... 120
2.9.2.1. Who and what may be reviewed? ..... 123
2.9.2.2. Jurisdictional limits ..... 125

2.9.2.2.1. The wording of Article 165(3)(b). ..... 126

2.9.2.2.2. The Public sphere. ..... 129

2.9.2.3. Justiciability limits. ..... 131

2.9.2.4. Political Question ..... 135

2.9.2.5. Interpretative Limits ..... 151

2.10. Conclusion ..... **Error! Bookmark not defined.**

**CHAPTER THREE ..... 158**

**LIMITS AND REMEDIES: HOW THE JUDICIARY HAS BALANCED HUMAN RIGHTS AND NATIONAL SECURITY CONCERNS. ..... 158**

3.1. Introduction ..... 158

3.2. Kenyan case law to illustrate post 2010 resistance to constitutional review. ..... 159

3.3. Kenyan case law to illustrate tentative but progressive change. ..... 164

3.4. Balancing Rights through judicial review under the Constitution. ..... 167

3.5. Article 24: Justifying limits on rights and freedoms. ..... 169

3.6. What is balancing? ..... 172

3.6.1. The Canadian experience. ..... 173

3.6.1.1 Pressing and substantial objective ..... 177

3.6.1.2.Rational connection ..... 178

3.6.1.3 Minimal impairment ..... 179

3.6.1.4 Proportionality ..... 180

3.6.1.5 Criticism ..... 180

3.6.2 The South African experience ..... 181

3.6.2.1 Law of General Application. ..... 185

3.6.2.2. Reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. ..... 186

3.6.2.3. Nature of the right ..... 189

3.6.2.4 Importance of the purpose of the limitation ..... 190

3.6.2.5 Nature and extent of the limitation ..... 191

3.6.2.6 Whether a less restrictive means to achieve the purpose exists ..... 196

3.7. Security Laws (Amendment) Act and the decision in Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others.....197

3.7.1 What informed the court in deciding as it did in SLAA? ..... 200

3.7.2 Considerations identified in SLAA that informed its findings. ..... 201

3.8. Is there a Constitutional standard the court should have adopted in SLAA? ..... 204

3.8.1. A Culture of Justifiability under Article 24(1). ..... 205

3.8.2 Proportionality ..... 213

3.9. Criticisms of balancing and proportionality in rights limitation analysis. ..... 217

3.10. Conclusion ..... 222

**CHAPTER FOUR ..... 225**

**JUDICIAL REVIEW: A DESIRABLE AND EFFECTIVE WAY TO CHECK AND BALANCE EXECUTIVE CONDUCT IN NATIONAL SECURITY MATTERS ... 225**

4.1. Introduction ..... 225

4.2. What happens when the elected branches are 'undemocratic'? ..... 228

4.3. How the ruling in SLAA could be democratic: Explaining judicial majoritarianism. ..... 231

4.3.1. Structural impediments to executive conduct ..... 232

4.3.2. Political impediments to executive conduct ..... 234

4.3.3. Topic-Specific impediments to executive conduct ..... 236

4.4. Why the Judiciary may be most representative in practice ..... 237

4.4.1. Judicial appointments process ..... 238

4.4.2. Majoritarian constraints on judicial decision making ..... 240

4.4.3 Majoritarian influences on judicial decision making ..... 242

4.5. Has Article 24(1) presented a new constitutional order? ..... 244

4.6. Is national security a threat to the new Constitutional order? ..... 247

4.7. Can vigorous judicial review of Executive conduct in national security be justified? ..... 255

4.7.1. Courts have a constitutional role in protecting Human Rights. ..... 256

4.7.2. Courts have a constitutional role in enforcing nondiscrimination by protecting the rights of minorities. ..... 257

4.7.3. Courts have a role in ensuring limits are not disproportionate. ..... 259

4.7.4. Judicial review is a welcome dialogue between courts and the Executive. ..... 260

4.7.5. It is insufficient that executive conduct may be designed to secure right to security or life. ..... 261

4.7.6. Exaggerated claims of legislative expertise. ..... 263

4.7.7. Exaggerated claims of executive expertise. ..... 264

4.8. Against judicial review ..... 265

4.9. Conclusion ..... 266

**CHAPTER FIVE ..... 269**

**HOW SOME LAWS THAT ENCROACH RIGHTS MIGHT BE JUSTIFIED. ..... 269**

5.1. Introduction ..... 269

5.2. Challenges faced by national security agencies ..... 270

5.3. Article 31: Freedom of Association.....274
5.3.1. Laws that interfere with Freedom of Association ..... 276
5.3.1.1. Prevention of Terrorism Act No 30 of 2012. ..... 276
5.3.1.2. Prevention of Organised Crimes Act, No 6 of 2010. ..... 279
5.3.1.3. Public Order Act cap 56. ..... 280
5.3.1.4. Kenya Citizenship and Immigration Act No 12 of 2011 ..... 281
5.3.2. Legitimate objectives ..... 284
5.3.3. Proportionality ..... 286
5.4 Article 32: Freedom of conscience, religion, belief and opinion ..... 287
5.4.1. Legitimate objectives ..... 291
5.4.2. Proportionality ..... 293
5.5 Article 33: Freedom of Expression. ..... 294
5.5.1. Legitimate objectives ..... 295
5.5.2. Proportionality ..... 297
5.6 Article 39: Freedom of movement and residence. ..... 300
5.6.1. Legitimate Objectives..... 304
5.6.2. Proportionality ..... 305
5.7 Article 40: Protection of Right to Property ..... 306
5.7.1. Proportionality ..... 309
5.8. Article 31: Privacy.....311
5.8.1. Proportionality.....313
5.8.2.Necessity.....316
5.9. Articles: 49, 50, 51 Article Fair trial.....316
5.10. Article 39: Freedom of Movement and Residence.....317
5.10.11. Legitimate objectives.....319

5.10.2. Proportionality.....320

5.11.Conclusion.....321

**CHAPTER SIX ..... 323**

**CONCLUSION AND RECOMMENDATIONS ..... 323**

6.1 Introduction ..... 323

6.2. Chapter Summary ..... 324

6.3. Recommendations ..... 328

6.3.1. Article 10(2): National Values ..... 328

6.3.2. Article 20(4): Interpretive Principles ..... 329

6.3.3. Article 24(1) The Limitation Article ..... 330

6.4. Conclusion ..... 335

## ABBREVIATIONS

| | | |
|---|---|---|
| AC | - | Appeal Cases |
| ALRC | - | Australian Law Reform Commission |
| B.C | - | Before Christ |
| CoK 2010 | - | Constitution of Kenya 2010 |
| CLP | - | Current Legal Problems |
| CLW | - | Common Law World |
| E.A | - | East Africa |
| ECHR | - | European Convention on Human Rights |
| ed / edn | - | Edition |
| EWCA | - | England and Wales Court of Appeal (UK) |
| FES | - | Friedrich Ebert Stiftung |
| HC | - | High Court |
| HCCC | - | High Court Civil Case |
| HRC | - | Human Rights Committee |
| ICCPR | - | International Covenant on Civil and Political Rights |
| KLR | - | Kenya Law Reports |
| L.J | - | Law Journal |

| | | |
|---|---|---|
| LQR | - | Law Quarterly Review |
| Misc | - | Miscellaneous |
| OJLS | - | Oxford Journal of Legal Studies |
| PL | - | Public Law |
| PRC | - | People's Republic of China |
| Rev | - | Review |
| SCR | - | Supreme Court Reporter |
| SIAC | - | Special Immigration Appeals Commission |
| SLAA | - | Security Laws Amendment Act |
| U.S | - | United States |
| UCLA | - | University of California Los Angeles |
| UDHR | - | Universal Declaration of Human Rights |
| UK | - | United Kingdom |
| UKHL | - | United Kingdom House of Lords |
| UN | - | United Nations |
| UNHRC | - | United Nations Human Rights Committee |
| Univ | - | University |
| WLR | - | Weekly Law Reports |

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A and others v. Secretary of State for the Home Department [2004] UKHL 56, [2 005] 2 AC 68....1, 15, 306

A v United Kingdom (1998) VI Eur Court HR 2692....214

Abbey Films v AG [1981] IR 158....27

Amax Potash Ltd. v. Government of Saskatchewan [1977] 2 S.C.R. 576...39

Andrew Lutakome Kayira and Paul Kawanga Semogerere v. Edwad Rugumayo, Omwony Ojok, Dr. F. E Sempebwa & 8 Others. Court of Appeal of Uganda Con stitutional Case No 1 of 1979....140

Anthony John Dickson & Others v. Municipal Council of Mombasa. HCMA No. 96 of 2000....298

Arizonians for Official English v. Arizona, 520 U.S. 43, 68 n.23 (1997)....131

Asare v. Attorney General, Writ No. 3/2002 (decided, Jan. 28, 2004, Sup. Ct., Ghana) (unreported)....51

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223 (HL) 228-230 .... 113,204, 261

Attorney-General (NSW) v. Quin (1990) 170 CLR 1, 37-38 per Brennan J....110

August v. Electoral Commission and Others 1999 (3) SA 1 (CC).....238

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 ....259

Baker v. Carr 369 U.S. 186 (1962.....132

Banco Nacional de Cuba v. Sabbatino, 376 U.S.398, 410 (1964)....195

Barlow v. Collins  392, U.S. at 95.(1970)....125

Biti & Another v. Minister of Justice, Legal and Parliamentary Affairs and Anot her (46/02) (2002) ZWSC10.....39,143

Blackburn v. Attorney General [1971] 1 WLR 1037....123, 293

Blanchette v. Conn. Gen. Ins. Corp. (Regional Rail Reorganization Act Cases), 4 19 U.S. 102, 140 (1974)....129

Canada (Attorney General) v. RJR-Macdonald, [2007] 2 S.C.R. 610.....258

Canadian context, R v. Big M Drug Mart [1985] 1 SCR 295.....244

Carmichelle v. Minister of Safety and Security 2001 4 SA 938 (CC).....221

Case & another v. Minister of Safety and Security & others; 1996 (5) BCLR 609 (CC).....237, 249

Charles Young Okany v. Republic Criminal Case 1189 of 1979 (unreported)....36

Chas. T. Main. Int'l v. Khuzestan Water & Power Auth., 651 F. 2d 800,813(1st Cir. 1981)..195

Chief Family Advocate and another v. G 2003 (2) SA 599 (W).....240

Chang Suan Tze v. Minister of Home Affairs [1988] SGCA 16, [1988] 2 S.L.R. (R .) 525, Court of Appeal (Singapore),.....105

Christian Education South Africa v. Minister of Education 2000 (10) BCLR 1051 (CC), 2000 (4) SA 757 (CC)....243

Church of Scientology of California v. United States, 506 U.S. 9, 12 (1992)...105, 131

Clinton v. City of New York, 524 U.S. 417 (1998).....10, 249

Coetzee v. Government of the Republic of South Africa...246

Corporation of the City of Enfield v. Development Assessment Commission (2000) 199 CLR 135, 157 ....105

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374....14

Curtis v. Minister of Safety and Security & others 1996 (5) BCLR 609 (CC) paras 48-63 (Mokgoro J), 91, 93 (Didcott J), 97 (Langa J) and 108-112.....249

Dames & Moore v. Regan, 224 U.S. 654, 668–69 (1981)....10

De Lange v. Smuts NO & others 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)....89, 245

De Reuck v. Director of Public Prosecutions (Witwatersrand Local Division) & others 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC)....245

Deployment of United States Armed Forces into Haiti, 18 Op O.L.C No. 34(Sept 27, 1994).....198

Doctors for Life International v. Speaker of the National Assembly and Others ( CCT 12/05) [2006] ZACC 11.....39, 143

Dodhia v. National and Grindlays Bank Ltd Court of Appeal for East Africa, [19 70] E.A. 195.....33

Dr Henry Morgentaler, Dr Leslie Frank Smoling and Dr Robert Scott v. Her Maj esty The Queen [1988] 1 S.C.R. 30.....232

Dr. Murungaru v. Kenya Anti-Corruption Commission (Nairobi H.C. Misc. Appli cation No. 54 of 2006 (O.S.).....37

Duncan Kahanamoku 327, U.S 304, 335 (1946).....198

Erad Suppliers & General Contractors Limited v. National Cereals & Produce B oard [2012] eKLR.....35

Ex parte Chairperson of the Constitutional Assembly of the Republic of South A frica 1996 (4) SA 744 (CC).....88

Ex parte Milligan, 71 U.S (4 Wall.)2 139 (1866) (Chase, C.J.).....186, 199

Fed. Election Comm'n v. Akins, 524 U.S. 11, 29–37 (1998).....136

Ferreira v Levin & others 1996 (1) SA 984 (CC), 1996 (1) BCLR 1, 26 (CC).....2 36

Firefighter's Local 1784 v. Stotts, 467 U.S. 561, 571 (1984).....131

Fleming v. Page, 50 U.S. (9 How.) 603, 615, 618 (1850).....186

Ford v. Quebec [1988] 2 S.C.R. 712.....233

Fredin v. Sweden (No 1) (1991) 192 Eur Court HR (ser A) .....331

Friends of the Earth v. Laidlaw Environmental Services, Incorporated, 528 U.S. 167, 190 (2000).....131

Gates v. Towery, 430 F.3d 429, 432 (7th Cir. 2005).....131

Gladstone Realtors v. Village of Bellwood, 441, U.S. 91, 99-100(1979) .....46

Goldwater v. Carter, 444 U.S 996, 1007 (1979).....44, 195

Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006).....10

Hamer v. Belgium [2007] v. Eur Court HR 73.....330

Her Majesty The Queen in Right of Canada v. Big M Drug Mart Ltd. [1985] 1 S. C.R. 295.....231

Humphrey's Executor v. United States 295 U.S. 602, 632 (1935)...172

Irwin Toy Ltd v. Quebec (Attorney General) (1989) 58 DLR (4th) 577.....237

J. R. Application No. 299 of 2011 High Court of Kenya at Nairobi Weldon K. Kor ir, J. July 4, 2012.....103

James v. United Kingdom (1986) 98 Eur Court HR (ser A).....331

Jesse Kamau & 25 Others v. Attorney General [2010] eKLR.....37

John Harun Mwau & 3 Others v. Attorney General and 2 Others Petition No. 6 5 of 2011.....122

Kariuki, Stephen Njoroge v. Republic Criminal Appeal No 600 of 2005.....2

Kenya Human Rights Commission v. Non-Governmental Organisations Co-Ordi nation Board [2015] eKLR.....208

Kevin K.Mwiti & Others v. Kenya School of Law & 2 Others, Petition 377, 395 & JR of 2015.....203

Kokebe Kevin Odhiambo &12 others v. Council of Legal Education & 4 others [ 2016] eKLR....206

Larbi-Odam and Others v. Member of the Executive Council for Education (Nor th-West Province) and Another 1997 (12) BCLR 1655 (CC), 1998 (1) SA 745 (CC ).....239

Law Society of Singapore v. Tan Guat Neo Phyllis [2007] SGHC 207, [2008] 2 S. L.R.(R.) 239, High Court (Singapore).....105

Lee Hsien Loong v. Review Publishing Co. Ltd. [2007] 2 S.L.R.(R.) 224, H.C. (Si ngapore).....106

Lesapo v. North West Agricultural Bank & another 2000 (1) SA 409 (CC), 1999 ( 12) BCLR 1420 (CC).....244

Little Sisters Book and Art Emporium, B.C. Civil Liberties Association, James E aton Deva and Guy Allen Bruce Smythe v. The Minister of Justice and Attorney General of Canada, the Minister of National Revenue and the Attorney General of British Columbia [2000] 2 S.C.R. 1120, 2000 SCC 69 (CanLII).....228

Liversidge v. Anderson [1942] AC 206.....14

Lord Mustill in R v. Home Secretary, Ex p Fine Brigades Union [1995] 2 at 513 at 567.....88

Magor and St. Mellons Rural District Council v. Newport Corporation (1965) [1 965] AC 117.....31

Makinana & others v. Minister of Home Affairs & another; Keelty& another v Mi nister of Home Affairs & another 2001 (6) BCLR 581 (C) 607A-D.....249

Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803)....39, 40, 189

Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32-33 (1827).....187

Masai Mara (SOPA) Limited v. Narok County Government [2016] eKLR....209

Massachusetts v. Laird, 451 F. 2d 26, 31 (1st Cir.1971).....199

Matinkinca v. Council of State, Ciskei 1994 (4) SA 472 (Ck), 1994 (1) BCLR 17, 34....236

Matiso & others v. Commanding Officer, Port Elizabeth Prison & others 1995 (4 ) SA 631 (CC), 1995 (10) BCLR 1382 (CC).....246

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Metcash Trading Ltd v. Commissioner for the South African Revenue Service & another 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC).....247

Minister for Immigration and Multicultural Affairs v. Bhardwaj (2002) 76 ALJR 598

Minister of Safety and Security v. Van Duivenboden 2002 6 SA 431 (SCA).....2 21

Mirugi Kariuki v. Attorney-General; High Court Misc. Application No. 540 of 19 86 ……..17

Mitchel v. Laird 488 F. 2d 611, 613 (D.C. cir. 1973)….199

Mkontwana v. Nelson Mandela Metropolitan Municipality & Another; Bissett & Others v. Buffalo City Municipality & Others; Transfer Rights Action Campaign & Others v. MEC, Local Government and Housing, Gauteng, & Others (Kwazul u-Natal Law Society and Msunduzi Municipality As Amici Curiae) 2005 (2) BCL R 150 (CC), 2005 (1) SA 530 (CC)……239

Morrison v. Olson 487 U.S. 654, 696 (1988)…….172

Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 others [2013] e KLR Civil Appeal No. 290 OF 2012….119

Municipal Council of Mombasa v. Republic & Umoja Consultants Ltd Civil App eal No.185 of 2001 [2015] eKLR ….206

Myers v. United States 272 U.S. 52, 117–18, 128–31, 163–64 (1926)….172

Nairobi High Court Petition No. 628 of 2014 consolidated with Petition No. 630 of 20154 and Petition No. 12 of 2015…….129

National Coalition for Gay and Lesbian Equality & others v. Minister of Home A ffairs & others 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)…..236, 237, 241, 24 6

Ngobit Estate Ltd v. Carnegie (1982) KLR 137…….7

Nixon v. United States 506 U.S. 224 (1993)…….136

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Nwamitwa v. Phillia & Others 2005 (3) SA 536 (T)……239

Oerlemans v. The Netherlands (1991) 219 Eur Court HR (ser A)……330

Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1998)……129

Oliver Brown et al v. Board of Education of Topeka et al 347 U.S. 483; 74 S. Ct . 686; 98 L. Ed. 873; 1954 U.S. LEXIS 2094; 53 Ohio Op. 326; 38 A.L.R.2d 11 80….35

Onuoha v. Okafor (Onuoha) (1983) NSCC 494…….132

Ooko v. R High Court Civil Case No 1159 of 1966 .....17

Osman v. United Kingdom (1998) VIII Eur Court HR 3124.....214

Pacific Bell Telephone Company v. Linkline Communications, 555 U.S. 438, 44 6 (2009).....131

Papastavrou v. Greece [2003] IV Eur Court HR.....330

Pastoli v. Kabale District Local Government Council & Others [2008] 2 EA 300 .....207

Patrick Ouma Onyango & 12 others v. Attorney General and 2 others; Nairobi, High Court Misc. App. 677 of 2005 (O.S) [2005] eKLR.....122, 138, 293

People's Union for Civil Liberties v. Union of India, (2004) 9 SCC 580.....300

Peter Okech Kadamas v. Municipal Council of Kisumu, Civil Appeal No.109 of 1 984 [1985] KLR 954; [1986-1989] EA 194.....120

Petersen v. Maintenance Officer & others 2004 (2) SA 56 (C), 2004 (2) BCLR 20 5 (C).....246

Phillips & another v. Director of Public Prosecutions (Witwatersrand Local Divis ion) & others 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC).....237

Pine Valley Developments Ltd v. Ireland (1991) 222 Eur Court HR (ser A)....330

Prince v. President of the Law Society of the Cape of Good Hope & others 2002 ( 2) SA 794 (CC), 2002 (3) BCLR 231 (CC) .....234, 249

Prize Cases 67 U.S. (2 Bl.) 635 (1863).....187

Public Committee Against Torture in Israel v. Israel, 53(4) P.D. 817.....300

R v. Judicial Service Commission Misc. Civil Application No. 1025 of 2003..... 94

R v. Minister for the Civil Service, ex p Council of Civil Service Unions [1985] A C 374 (HL).....261

R v. Oakes (1986) ISCR 103.....229

R v. Chief Justice of Kenya and others ex parte Lady Justice Roselyn Naliaka N ambuye, [Miscellaneous Civil Case Number 764 of 2004].....5

R v. Halliday, ex parte Zadig [1917] AC 260....14

R v. Secretary of State for Home Affairs, ex parte Hosenball [1977] 1 WLR 766…….14

R v. Chaulk (1990) 3SCR 1303……257

R v. Oakes (1986) ISCR 103……254

R (Cart) v. Upper Tribunal [2010] EWCA Civ 859……105

R v. Committee of the Lords of the Judicial Committee of the Privy Council acting for the Visitor of the University of London, ex parte Vijayatunga (1987) [1988] Q.B. 322, High Court (Queen's Bench) (England & Wales)……104

R v. Edwards Books and Art [1986] 2 S.C.R. 713……232

R v. Hebert,[1990] 2 S.C.R. 151……228

R v. Therens, [1985] 1 S.C.R. 613……228

Rail Commuters Action Group v. Transnet Ltd t/a Metrorail 2005 2 SA 359 (CC)……221

Raila Odinga v. Attorney General HCCC Miscellaneous Application No 104 of 1986……36

Ramsden v. Peterborough [1993] 2 SCR 1084……232

Rashid Moledina v. Hoime Ginners [1967] E.A. 645 at p.655…..33

Re Burrell, 415 F.3d 994, 998 (9th Cir. 2005…….131

Re Certification of the Constitution of South Africa (the First Certification case) 1996 (4) SA 744……27

Re Manitoba Language Rights [1985] 1 SCR 721, 748--9, 19 DLR (4th) 1……39, 238

Re Reference Secession of Quebec [1998] 2 SCR 217……27

Re The Matter of the Interim Independent Electoral Commission Supreme Court of Kenya Advisory Opinion No 2 of 2011……90

Republic v. Cabinet Secretary, Ministry of National Security & Interior Co-ordination 3 others Ex parte Shukri Abdilhafidh & another Nrb HC Judicial Review Case No. 318 Of 2014…….297, 302

Republic v. Commissioner of Customs Services Ex-Parte Africa K-Link Internati onal Limited [2012] eKLR.....205

Republic v. Commissioner of Prisons ex parte Kamonji Wachira High Court Mis c. Civil case No. 60 of 1984 .....17

Republic v. Kenya Revenue Authority Ex Parte Abdalla Brek t/a Al Amry Distri butors and 4 Others [2016] eKLR.....205

Republic v. Kenyatta University, Vice Chancellor—Kenyatta University & 5 othe rs Ex-Parte Elena Doudoladova Korir [2015] eKLR.....207

Republic v. Minister for Tourism & another Ex-parte Abdulrahman Rizik & 4 ot hers [2014] eKLR , High Court of Kenya at Nairobi Misc Application No 1313 of 2012.....141, 294

Republic v. Minister of State for Immigration and Registration of Persons Ex-Pa rte C.O NRB HCJR Misc. Civil Application No. 5 Of 2013.....296

Republic v. Permanent Secretary/Secretary to the Cabinet and Head of Public Service, Office of The President & 2 Others ex-parte Stanley Kamanga Nganga [ 2006] eKLR.....29, 94

Republic v. President & 7 others Exparte Wilfrida Itolondo & 4 others [2014] eK LR Judicial Review Application Number 232 OF 2012.....126

Republic v. Public Procurement Administrative Review Board & 2 Others Ex-Pa rte Seven Seas Technologies Limited, Misc.Civil Application no 168 of 2014.....2 03

Republic v. The Judicial Service Commission & another ex parte Joyce Manyasi [2012] eKLR.....103

Republic v. Commissioner of Prisons ex parte Kamonji Wachira, Edward Akong o Oyugi and George Moseti Anyona HCCC 60 of 1984 (unreported)....36

Republic v. El Mann (1969) EA 357.....36

Republic v. Judicial Service Commission ex parte Pareno [2004] 1 KlR 203-209 .....297

Republic v. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKL R.....296

Rev. Timothy Njoya & Others v. The Constitution of Kenya Review Commission and Other [2004]1 K.L.R.232.....37

RJR - MacDonald v. Canada [1995] 3 S.C.R. 199.....232

Robert Matthew Chaulk and Francis Darren Morrissette v. Her Majesty The Qu een [1990] 3 S.C.R. 1303.....229

Rose Moraa & Another v. Attorney General [2006] eKLR.....7

S v Bhulwana; S v. Gwadiso 1996 (1) SA 388, 1995 (12) BCLR 1348 (CC) paras 19, 21.

S v. Dodo 2001 (5) BCLR 423; 2001 (3) SA 382.....27

S v. Makwanyane & another 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665, 707 (CC).....236, 240, 241

S v. Mamabolo (E TV & others intervening) 2001 (3) SA 409 (CC), 2001 (5) BCL R 449 (CC).....236, 247

S v. Manamela& another.....242

S v. Mbatha; S v Prinsloo 1996 (2) SA 464 (CC), 1996 (3) BCLR 293....246

S v. Nocuse & Others 1995 (1) SACR 510 (C), 1995 (3) SA 240 (Tk).....24 0

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S v. Zuma & others 1995 (2) SA 642 (CC), 1995 (1) SACR 568 (CC), 1995 (4) BC LR 401, 414 (CC).....236, 237

Sanford v. Haley No 2004 (3) SA 296 (C).....240

Secretary of State for the Home Department v. Rehman [2001] UKHL 47, [2003] 1 AC 153.....15

Secretary of State of Maryland v. J H Munson Co 467 US 947 (1984).....237

See United States Military and Naval Bases in the Philippines, 41 Op. Att,y. Ge n 143,163 (1953).....196

Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972).....124

South African Association of Personal Injury Lawyers v. Heath, 2001 (1) BCLR 77 (CC).....89

South African National Defence Union v. Minister of Defence & Another 1999 (4 ) SA 469 (CC), 1999 (6) BCLR 615 (CC).....237, 245

Speaker of National Assembly v. Njenga Karume [2008] 1 KLR 425.....134, 293

Speaker of the Senate & another v. Hon. Attorney-General & another & 3 other s [2013] eKLR Advisory Opinion Reference No. 2 of 2013.....44, 138, 142, 294

Sunday Times v. United Kingdom (1979) 2 EHRR 245 at para 49;....238

Tajjour v. New South Wales (2014) 313 ALR 221, [8].....316

Texas v. United States, 523 U.S. 296 (1998).....128

The Apollon, 22 U.S (9 Wheat.) 362, 366-67 (1824).....198

The Attorney General of Quebec v. Irwin Toy Limited [1989] 1 S.C.R. 927.....228

The High Court in Republic v. Chief Justice of Kenya and Others ex parte Moijo Mataiya Ole Keiwua [2012] 2 EA 313,.....35

The Owners of Motor Vessel “Lillian S” v. Caltex Oil Kenya Ltd [1989] KLR 1.....116

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985).....128

Tory v. Cochran, 544 U.S. 734, 736-37 (2005).....131

Trusted Society of Human Rights Alliance v. Attorney General & Others Petition No 229/2012.....122

U.S. Term Limits, Inc. v. Thornton 514 U.S. 779 (1995).....137

United States v. Belmont, 301 U.S 324, 330 (1937).....195

United States v. Curtiss Wright Corp., 299 U.S. 304, 318-19 (1936).....45

United States v. Nixon, 418, U.S. 683, 707,712, (1974) .....45

United States v. Pink, 315 U.S 203, 229-30(1942).....195

United States v. Smith, 27 F. Cas 1192,1230 (C.C.D.N.Y 1806) (No.16, )…….……199

United States v. Sweeny, 157 U.S 281, 284 (1895)…….200

Van Eeden v. Minister of Safety and Security 2003 1 SA 389 (SCA).….221

Virginia Wangari Njenga (Suing as administratix of the Estate of Charles Njeng a Mukuna) v. Land Registrar, Murang'a & 2 others[2015] eKLR.….207

Vriend v. Alberta [1998] 1 S.C.R. 493……231

Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case) 343 U.S. 579, 63 4 (1952)……45

## CHAPTER ONE:

## INTRODUCTION.

### 1. National security as a constitutional obligation

In terms of chapter fourteen of the Constitution of Kenya 2010, the government has the obligation to protect 'against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.'[1] Some of the legal strategies employed by government to protect against these threats have attracted criticisms focusing on the lack of compatibility with fundamental constitutional principles and are anathema to rule of law.[2] Judicial oversight of the exercise of executive power in the area of national security has not been effective nor consistent. In this era of international terrorism the executive while responding to real or perceived threats to national security has tended to exercise power in a manner that offends the human rights doctrine of proportionality while several counter-terrorism laws have failed to strike an appropriate balance

[1] The Constitution of Kenya 2010, Article 238(1).

[2] See, for example, *A and Others v SSHD* (2004) UKHL 56 [74] (Lord Nicholls): 'Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law'; see generally Lord Phillips, 'Impact of Terrorism on the Rule of Law' [2007] Speech to American Bar Association Conference, <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj_american_bar_assoc_031007.pdf> accessed 17 November 2017; the discussion of Aileen Kavanagh, 'Constitutionalism, counterterrorism and the courts: Changes in the British Constitutional landscape' [2011] IJCL 9(1) 172, 173; Michael Fordham, 'The Rule of Law and Civil Restraint: Cheating the Criminal Law' [2011] JR 336; KD Ewing, Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law (OUP, 2010) Ch 4; Owen Fiss, 'The War Against Terrorism And The Rule Of Law' [2006] OJLS 235; Seung-Whan Choi, 'Fighting Terrorism through the Rule of Law?' [2010] Journal of Conflict Resolution 54, 940; James A Goldston, 'The Rule of Law Movement in an Age of Terror' [2007] 20 Harvard Human Rights Journal at 15.

between government obligation to protect and human rights.[3] This thesis seeks to address this paradox. The underlying hypothesis of this effort is that judicial oversight has been ineffective and inconsistent but through a range of constitutional doctrines and by optimization of constitutionalism this paradox can be addressed more satisfactorily by exercise of a resurgent judicial power under Article 2(2) of the Constitution.

### 1.1 Constitutional basis of Judicial review

In terms of Article 2(2) of the Constitution of Kenya 2010, submission of public activity to judicial and other legal controls is a rule of law requirement.[4] Thus, in accordance with the principle of the pre-eminence of law, executive authority is subject to the law and to supervision by the courts on the same basis as any individual or citizen.[5] Executive authority takes many forms, and is

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[3] *Salim Awadh Salim & 10 others v Commissioner of Police & 3 others* HC Petition No. 288 of 2008. Para 135 "The threat posed by terrorism is beyond dispute, but it cannot be used as an excuse for weakening fundamental human rights enshrined in international law such as article 3 of CAT, as well as in domestic constitutions such as ours." See also para 136 "The state cannot cite national security concerns to justify its acts, particularly at this point in time when the Constitution of Kenya 2010 clearly spells out at Article 25 that the right not to be subjected to torture and other cruel and degrading treatment cannot be derogated from..."

[4] The article provides: "(2) No person may claim or exercise State authority except as authorised under this Constitution."
See also *Kariuki, Stephen Njoroge v Republic* Criminal Appeal No 600 of 2005 where Ojwang' J observed as follows

> "This court is guided by the rule of law; and the rule of law dictates that, on property upon which an innocent claim of whatever nature is being made by [somebody], the said claim is not to be nullified by a different person by means of sheer violence, without recourse to lawful procedures – such as peaceful request, negotiation, proper notice, or judicial settlement."

[5] Pre-eminence of law is also known as rule of law and supremacy of the Constitution and is provided for in Article 2(1) as follows "This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government." This Article is illuminated by well recorded and profound scholarship. Ronald Dworkin in his locus classicus, Law's Empire, [Dworkin, R., (Ed) (1986) Cambridge: Belknap Press p 7 remarks as follows:

> "We live in and by law. It makes us what we are: citizens and employees and doctors and spouses and people who own things. It is sword, shield, and menace: we insist on our wage, or refuse to pay our rent, or are forced to forfeit penalties, or are closed up in

presumptively exercised by virtue of constitutional authority, and in the public interest – its main agency being the executive branch of government.[6]

Subjection to legal control in terms of Article 2(2) means that executive authority is not immune to judicial scrutiny even if separation of powers doctrine demands that it is the executive arm of the state and not the judiciary which has the task of identifying objectives that serve the public interest and choosing the means to achieve such objectives.[7] The control is largely borne of the fear that executive powers by their very nature are ill-defined and far-reaching and while in use are so easily abused, or annexed for partisan or personal ends.[8]

Lack of clear judicial guidelines for judicial review of national security powers and abuse of power by the executive in the past has raised special concerns for democratic accountability and the rule of law, as well as the effectiveness of a varied range of fundamental rights. Consequently, it is worth taking a look at the established practices about the interface between executive and judicial power under the Constitution, starting with the source of all state power-the people.

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jail, all in the name of what our abstract and ethereal sovereign, the law, has decreed ...We are subjects of law's empire, liegemen to its methods and ideals..."

[6] See Article 129(2) Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their wellbeing and benefit.

[7] *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* [2014] eKLR [Civ Appeal 21 of 2014] See para 62 "The political question doctrine and the concept of separation of powers cannot oust the jurisdiction of courts to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of the Constitution as per Article 165(3)(d)(iii)."

[8] Ojwang' JB.,(2008) The Independence of the Judiciary in Kenya: Kenya Law Review vol II [2008-2010]. Paper Presented at the Conference on the Independence of the Judiciary in Sub-Saharan Africa: Towards an Independent and Effective Judiciary in Africa. Imperial Resort Beach Hotel, Entebbe, Uganda, June 24-28, 2008.

Under Article 1(3) sovereign power is derived from the people and delegated to the three branches of government. It is to be assumed that the delegation under this order is without priority nor preference. In terms of Chapter 10, judicial authority is for the first time in Kenya's post-independence constitutional history specifically stated as derived from the people[9] and this places the judiciary at par with the democratically elected executive[10] and legislature in terms of their source of legitimacy.[11] More fundamental is the relationship between judicial authority on the one hand and executive and legislative authority on the other on constitutional disputes.

Under Articles 159(1) and 165(3) the Supreme Court and the High Court respectively have the final say on interpretation of the Constitution. To this extent, Parliament and the Executive are all bound by any interpretation the Judiciary may attach to the Constitution. This has not always been the case because in the past, an all-powerful executive, a malleable legislature, a weak judiciary and fusion of powers had defined power relations between the three arms of government. In this scheme of power, the Judiciary being the weaker

[9] Article 159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
[10] The President and Deputy President are democratically elected under Article 136. The rest of the Executive comprising the Attorney-General and Cabinet Secretaries are not elected executives but must in terms of Article 132 meet the approval of the National Assembly after nomination for appointment by the President. The cabinet secretaries are in terms of Article 153(2) accountable to an elected President. These two attributes suggest strong democratic legitimacy of cabinet secretaries even though unelected.
[11] Article 101. (1) A general election of members of Parliament shall be held on the second Tuesday in August in every fifth year.

branch had, like in many other jurisdictions, been unable to compete with the executive.[12]

The Constitution of Kenya 2010, from the foregoing, can be said to place the three arms of government on a common pedestal which cannot be said of the past when the Judiciary was the weakest of the three. More fundamental is the pre-eminence of the judiciary where the matter at hand involves interpretation of the Constitution. This has not been without consequences for the executive and legislature.

On the executive, established practices while exercising constitutional powers under Articles 131 and 132 have since been brought into sharp focus, empowering the judiciary and expanding judicial review to uncharted territory.[13] The constitutionalisation of the Bill of Rights and power to question whether any law is "inconsistent with or in contravention"[14] of the Constitution has

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[12]Kriegler and Waki Reports on 2007 Elections; Summarised Edition pg 48. "Laws were passed to increase executive authority, and other laws seen as being in the way of an executive presidency are often changed or even ignored. By 1991, the Constitution had been amended about 32 times. Hence, the checks and balances normally associated with democracies are deliberately weak in Kenya.
Individuals in various parts of Government whether in the civil service, the judiciary, and even in Parliament, understand that, irrespective of the laws, the executive arm of government determines what happens. Hence, the State is not seen as neutral but as the preserve of those in power. As such, Government institutions and officials lack in integrity and autonomy."

[13] See i.e. In *R v. Chief Justice of Kenya and others ex parte Lady Justice Roselyn Naliaka Nambuye,* [Miscellaneous Civil Case Number 764 of 2004] the question arose as to whether judicial review can be used to challenge constitutional powers. The applicant had challenged the powers of the President and the Chief Justice in respect of section 62 of the Constitution. The court held in the negative, per Nyamu, J:

> ...the exercise of presidential powers under the Constitution cannot be challenged by way of Judicial Review at all because Judicial Review jurisdiction is derived from an Act of Parliament and is not entrenched in the Constitution unlike India and the United States where Judicial Review jurisdiction has been specifically conferred under the respective constitutions. In Kenya the jurisdiction is statutory.

[14] Article 165 (3) (d) (i).

benevolent and progressive origins, and significant re-distributive, and power-diffusing consequences. Due to this empowerment, the judiciary as conceived under Chapter Ten of the Constitution has become crucial for dealing with the most fundamental questions a democratic polity can contemplate.

The role of the judiciary under the Constitution to invalidate legislation or executive actions which conflict with the Constitution derives from Article 165(3). This power of "judicial review" has given the High Court a crucial responsibility in assuring individual rights, as well as in maintaining a "living Constitution" whose broad provisions can continually be applied to complicated new situations. This power of the judiciary has given rise to questions about its relationship with executive authority in national security matters.

### 1.2 Questioning judicial review of national security

Should matters of national security be subjected to judicial review? Should such questions be strictly within the purview of executive competence as the institution that is best equipped to anticipate threats to national security?

The judiciary under Article 165(3)(d) has jurisdiction to hear any question respecting the interpretation of the Constitution. That the judiciary, a non majoritarian institution, may under this Article declare a legislative or executive act unconstitutional can be perceived as counter-majoritarian.[15] As Alexander

[15] Ojwang' JB, The Unity of The Constitution and the Common Law. Lesson From Kenya's Experience in Comparative Context [A Thesis Submitted for the Degree of Doctor of Laws at The University of Nairobi 2017] at page 29. "The non-majoritarian establishment, which takes the form of the Judicial Branch in the first place, has proved itself as the most dependable framework of restraint to extremes of majoritarianism…So vital is this category of legitimacy in good

Bickel[16] famously put it in his classic work *The Least Dangerous Branch,*[17] "the root difficulty is that judicial review is a counter-majoritarian force in our system."[18] As the term suggests, some oppose or see a problem with the judicial branch's ability to invalidate, overrule or countermand laws and executive or administrative conduct that reflect the will of the majority.

The Constitution of Kenya 2010 gives rise to a counter-majoritarian difficulty or dilemma which perceives as problematic unelected judges using the power to determine constitutionality under Article 165(3)(d) to nullify the actions of elected executives or legislators.

Kenyan courts have over the years harboured such concerns by endorsing the opinion of Potter, J. The judge stated that:

> The function of the Judiciary is to interpret the statute law not to make it and where the meaning of a statute is plain and unambiguous no question of interpretation or construction arises. It is the duty of the Judge to apply such a

governance, it is indeed a condition to the realization of progressive governance as perceived in Africa's modern Constitutions, including the Constitution of Kenya, 2010."
See also Friedman, B The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 NYUL Review 333,334 (1988); Ilya Somin, Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory, 89 IOWA. L. Review. 1289, 1290 (204).

[16] Alexander Mordecai Bickel (December 17, 1924 – November 8, 1974) was a law professor and expert on the United States Constitution. One of the most influential constitutional commentators of the twentieth century, his writings emphasize judicial restraint.

[17] It was Bickel who coined the phrase "countermajoritarian" difficulty in 1962. Id. For Bickel's first published use of the term, see Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16 (1962). On the development of Bickel's views on the countermajoritarian difficulty, see Anthony Kronman, Alexander Bickel's Philosophy of Prudence, 94 YALE L. J. 1567 (1985); John Moeller, Alexander M. Bickel: Toward a Theory of Politics 47 J. POL. 113 (1985).

[18] Bickel, above note 2 at 16.

law as it stands. To do otherwise, would be to usurp the legislative functions of Parliament.[19]

The judiciary in Kenya had for long prior to the 2010 Constitution religiously held this textual position that the words of the Constitution or a statute should be accorded their natural and ordinary sense.[20]

The counter-majoritarian difficulty is sometimes characterized as a problem with the institution of judicial review, but it could also be understood as a difficulty for any constitution that constrains the majority will by incorporating judicial supremacy. In the Constitution of Kenya 2010, for example, the High Court has the power under Article 165 (3)(d) to determine "the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution." Because this article confers on the judiciary the ultimate authority of interpreting the Constitution, questions arise on the challenges this may create for the exercise of executive functions including questions of national security.

Under the Constitution of Kenya 2010 which is law and binding on the Government,[21] the practice of judicial review inherently raises questions of the relationship between constitutional interpretation or construction, the Constitution–the law–which is construed, and "anything said to be done under

[19] *Ngobit Estate Ltd V Carnegie* (1982) KLR 137.
[20] See for example the case of *Rose Moraa & Another v Attorney General* [2006] eKLR. (while conceding that some of the reasoning in the case of *Republic v El Mann* 1969 EA 357 have been substantially overtaken especially in the interpretation of the Constitution.)
[21] Article 2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

the authority of the constitution or of any law."[22] The legitimacy of an interpretation or construction by an unelected entity in a democratic system becomes problematic whenever the construction contradicts action by a democratically constituted organ.

The interpretive authority of the courts is rooted in a familiar duality. On the one hand, the judiciary by virtue of life tenure enjoys independence from the political branches and public passions of the moment. It therefore bears a responsibility to render decisions without fear or favour toward the political majority. On the other hand, the judiciary has neither force nor will, but merely judgment. In practice therefore, the voice of an unelected judiciary on constitutional questions must ultimately draw its authority from the people or public's acceptance of its institutional role, even when its specific decisions are controversial.

Constitutional adjudication thus combines both counter-majoritarian and majoritarian elements. In interpreting and applying the Constitution, the challenge that faces the judiciary is that it must exercise independence from politics while reflecting the common will in order to secure the democratic legitimacy of its decisions. These institutional features frame the criticisms that the judiciary faces whenever it interprets the Constitution in a manner that contradicts and creates tensions with the executive.[23]

[22] Article 165(3)(d)(ii)
[23] Thomas, "Administrative Jurisdiction: The Jewel in the Crown", (1998) 9 Public Law Review 43 at 46.

Such tensions are the result of judicial review[24] of administrative action which because it involves a "vindication of the legality of the administrative decision-making process"[25] is perceived as performing a "watch-dog" role – particularly by the Executive – a notion captured in the United Kingdom civil service publication – "The Judge Over Your Shoulder".[26] Put simply, the executive arm is uncomfortable with an unelected arm having powers to override its authority.

In carrying out judicial review of executive action, the judiciary often questions executive power[27] because adverse decisions impact on the legality of executives' conduct. Executives understandably take unkindly to findings that they acted unlawfully even though such a finding usually means no more than acting *ultra vires*. Occasionally, an exercise of judicial review may even cause animosity[28] between the judiciary and the executive arm of the state and inevitably, the executive perceives the extension of judicial review as an encroachment on

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[24] Brennan, "The Parliament, the Executive and the Courts: Roles and Immunities", (1997) 9 Bond Law Review 136 at 144.

[25] Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 76 ALJR 598; 187 ALR 117 per McHugh J. See also Sackville, "The Limits of Judicial Review of Executive Action – Some Comparisons Between Australia and the United States", (2000) 28 Federal Law Review. 315 at 321. See also Mason, "Judicial Review: A View from Constitutional and Other Perspectives", (2000) 28 Federal Law Review 331 at 331-332.

[26] McMillan, "Recent Themes in Judicial Review of Executive Action", (1996) 24 Federal Law Review 347 at 365.

[27] See generally Williams, "Judicial Independence and the High Court", (1998) 27 University of Western Australia Law Review 140 at 154; Woolf, "Judicial Review – The Tensions Between the Executive and the Judiciary", (1998) 114 Law Quarterly Review 579 at 587; Brennan, "The Parliament, the Executive and the Courts: Roles and Immunities", (1997) 9 Bond Law Review 136 at 144.

[28] Sackville, "The Limits of Judicial Review of Executive Action – Some Comparisons Between Australia and the United States", (2000) 28 Federal Law Review 315 at 319-20. See also Woolf, "Judicial Review – Tensions Between the Executive and the Judiciary", (1998) 114 Law Quarterly Review 579 at 587.

executive authority.[29] The area of executive authority most prone to contestation over the extent of judicial oversight is national security. This is so largely because there does not exist clear guidelines that could inform judicial review that respects institutional competence of the executive in matters of national security while reinforcing the constitutional mandate of the judiciary to ensure adherence to the constitution.

## 2. Statement of the Problem: A Missing model for judicial review of national security functions.

National security concerns have historically provided a strong basis for judicial deference based on an executive plea of public privilege to avoid judicial intervention. However, with enhanced rights under the Constitution of Kenya 2010, such privileges have faced up to a greater number of Kenyan citizens' civil liberties. In the past, whenever such cases have arisen, the judiciary has frequently accorded deferential treatment to the executive on matters of national security, and any semblance of meaningful review has been minimal.[30]

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[29] Thomas, "Administrative Jurisdiction: The Jewel in the Crown", (1998) 9 Public Law Review 43 at 45. See also Sackville, "Limits of Judicial Review of Executive Action – Some Comparisons Between Australia and the United States", (2000) 28 Federal Law Review 315, at 317.

[30] See *Ooko v R* High Court Civil Case No 1159 of 1966 when the court held that grounds for detention are matters for the minister and not for the court; *Republic v Commissioner of Prisons ex parte Kamonji Wachira* High Court Misc. Civil case No. 60 of 1984 the court held that in the event of insufficiency of grounds of detention, the detainee should raise the issue with the Detainees Review Tribunal and not with the court; *Mirugi Kariuki v Attorney-General* High Court Misc. Application No. 540 of 1986 the High Court was of the view that "The Ministers' order detaining Kariuki was proper and clear and there was no question of improper detention".

This is attributable to the stakes involved in national security being weighty and, in many instances present the courts with an artificial choice on the one hand, to uphold a potentially over-zealous exception but avoid danger, and on the other, to strike down such an exception in favour of civil liberties only to risk causing mass tragedy.[31]

In light of the potentially dire consequences for the liberties of individual defendants, the prevalence of claims of national security privilege is highly problematic since besides acting as a cover for executive illegality,[32] it denies the accused the right of access to information under Article 35[33] and a fair hearing under Article 50(2)(j).[34]

On another front, a problem presents itself when a victim of rights violations such as torture and detention without trial institutes civil proceedings in court for compensation or just exoneration. Here too, the national security privilege

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[31] Cases where this artificial choice has been made are: Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR…"that courts must also defer to the other branches where the constitutional design so ordains"; Okiya Omtata Okoiti vs Independent Electoral and Boundaries Commission & 2 Others (2017) eKLR… "when granting orders of judicial review, and particularly stay, the court has a reciprocal duty to ensure that it does not hamstring statutory bodies from performing their lawful duty or duties as bestowed upon them by the relevant law."…; Baseline Architects Limited & 2 Others v National Hospital Insurance Fund Board Management (2008) eKLR… "there are circumstances in which the public interest must be dominant over the interest of a private individual."

[32] In the Matter of the Interim Independent Electoral Commission SCK Constitutional Application No. 2 of 2011 [2011] eKLR

[33] Article 35. (1) Every citizen has the right of access to—
(a) information held by the State; and
(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.

[34]Article 50 (2) Every accused person has the right to a fair trial, which includes the right—
(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

has the potential impact of blocking claims by survivors against the state, which is a denial of access to justice contrary to Article 48.[35] This is attributable to the fact that it is very difficult for private litigants to get disclosure of information over which the government has claimed national security privilege in a previous criminal case, and as a result, survivors face serious obstacles in the pursuit of their civil claims.[36]

With civil liberties at stake in many contexts where national security privilege is raised, it is inappropriate that there does not exist a basic constitutional, statutory or judicial model to guide courts in the area of national security based on clear principles. The scope of executive authority is also not defined and neither are there precise guidelines for its judicial review. There is a knowledge gap on the approach judges must adopt in judicial review while deciding cases that involve the constitutionality of measures taken by the executive branch of government to protect the national security.

This study is designed to examine the exercise of judicial review under Article 165(3), to ascertain whether the judiciary can and if so to what extent it should exercise oversight to curtail abuse of executive power in national security matters and to propose a framework that may be adopted in judicial review.

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[35] Article 48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice. A significant number of *Nyayo* Era political detainees have sued the state for compensation, exoneration and accountability.
[36] See Republic v Inspector General of Police & another Exparte Edmund Polit James & another [2019] eKLR at para 34. In other words, a court must be slow to intervene in the exercise and performance of powers and functions by the police in relation to the investigation of crime, especially where the officials involved possess the experience and expertise to make a better decision than a court on how to conduct such an investigation.

## 3. Theoretical/Conceptual Framework

### 3.1 Rule of Law

In ensuring the national security of its citizens, the executive is to operate within the framework established by the constitution and the courts in litigating disputes arising out of national security concerns must similarly do so within the framework of the constitution. To this extent, the doctrine of Rule of Law provides the primary framework for this thesis.

The Rule of Law Clause in the Constitution is Article 1(1) which provides "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution." The rule of law, at its core, requires that government officials and citizens are bound by and act consistent with the Constitution and other laws. This basic requirement entails a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms. In the absence of these characteristics, the rule of law cannot be satisfied.

The Rule of Law is seen as a crucial ideal, and one that is appropriately invoked whenever governments try to get their way by arbitrary and oppressive action or by short-circuiting the norms and procedures laid down in a country's laws or Constitution. Interfering with the courts, jailing someone without legal justification, detaining people without any safeguards of due process,

manipulating the Constitution for partisan advantage all these are seen as abuses of the Rule of Law.

The Rule of Law is a multi-faceted ideal, but most conceptions give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.[37]

Rule of Law also places great emphasis on legal certainty, predictability, and settlement, on the determinacy of the norms that are upheld in society, and on the reliable character of their administration by the state. Citizens need predictability in the conduct of their lives and businesses.[38] Knowing in advance how the law will operate enables one to plan around its requirements.[39] This conception of law emphasizes the virtues that Lon Fuller talked about in his book *The Morality of Law*: the prominence of general norms as a basis of governance, the clarity, publicity, stability, consistency, and prospectivity of those norms, and congruence between law on the books and the way in which public order is

[37] Article 2 (2) No person may claim or exercise State authority except as authorised under this Constitution.

[38] Article 94 (5) No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.
(6) An Act of Parliament, or legislation of a county, that confers on any State organ, State officer or person the authority to make provision having the force of law in Kenya, as contemplated in clause (5), shall expressly specify the purpose and objectives for which that authority is conferred, the limits of the authority, the nature and scope of the law that may be made, and the principles and standards applicable to the law made under the authority.

[39] See, especially, F.A. Hayek, *The Constitution of Liberty* (University of Chicago Press 1960) p. 153, 156-7

actually administered.[40] On Fuller's account the Rule of Law does not directly require anything substantive: for example, it does not require that we have any particular liberty. All it requires is that the state should do whatever it wants to do in an orderly predictable way, giving us plenty of advance notice by publicizing the general norms on which its actions will be based, and that it should then stick to those norms and not arbitrarily depart from them even if it seems politically advantageous to do so. Requirements such as these are formal and structural in their character: they emphasize the forms of governance and the formal qualities (like generality, clarity, and prospectivity) that are supposed to characterize the norms on which state action is based.

A separate current of thought in the Rule-of-Law tradition also exists but which emphasizes procedural issues. It holds that the Rule of Law is not just about general rules; it is about their impartial administration. For example, one of the great nineteenth century theorists of the Rule of Law, Albert Venn Dicey, placed at least as much emphasis on the normal operation of the ordinary courts as he did on the characteristics of the norms they administered.[41] A procedural understanding of the Rule of Law does not just require that officials apply the rules as they are set out; it requires that they apply them with all the care and attention to fairness that is signalled by ideals such as natural justice and procedural due process. The Rule of Law is violated when the institutions that

[40] Fuller L.L, *The Morality of Law* (Yale University Press, 1969, 1969). p. 39,46-91
[41] Dicey A.V, Introduction To The Study of The Law of the Constitution (Liberty Classics Edition, 1982). p.110-121

are supposed to embody these procedural safeguards are undermined or interfered with. In this way the Rule of Law has become associated with political ideals such as the separation of powers and the independence of the judiciary.

One function of the Rule of Law is to impose legal restraints on government officials. This it does in two different ways; first by requiring compliance with existing law;[42] and second by imposing legal limits on law-making power.[43] Fear of the uncontrolled application of coercion by the sovereign or the government is an ancient and contemporary concern. The rule of law responds to this concern by imposing legal constraints on government officials.

### 3.2 Separation of Powers

The executive in ensuring national security of citizens often times results in suits that question constitutionality or legality of its actions. A citizen aggrieved by executive conduct is free to petition for judicial review of such on grounds that his rights have been infringed or the correct procedure has not been adopted. When the executive responds to such suit by a plea of executive privilege a court has to balance the scales of justice with a keen eye on the powers of the various arms of government and what the constitution mandates them to do. The constitutional mandates are conferred upon the Legislature, Executive and

[42] Article 2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
(2) No person may claim or exercise State authority except as authorised under this Constitution.
[43] Article 93 (2) The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution.

Judiciary. The separation of powers and related doctrine of checks and balances is the second theory upon which this thesis rests.

The three organs of state power are identified in Article 1(3) in a configuration of state power which is also known as separation of powers, or *trias politica*. This is a term coined by French political enlightenment thinker Baron de Montesquieu,[44] and is a model for the governance of democratic states. Separation of powers found its classical formulation in Article 16 of the French Declaration of Rights of August 1789.[45]

Some authors[46] have suggested that the theory of the separation of powers grew out of the older theory of mixed monarchy as expressed by the Greek historian Polybius who argued that instead of having an aristocracy, monarchy or democracy, a combination of any two of these forms of government would suffice as a check on arbitrary power and to escape this vicious cycle.

It is important to note that all the constitutionalism of antiquity operated without, and often in conflict with the idea of separation of powers. It is true that both the Greek *polis* state and the Roman republic assigned specific functions to elected officials. But substantially different functions-executive, legislative,

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[44] "Baron de Montesquieu, Charles-Louis de Secondat (Stanford Encyclopedia of Philosophy)" http://plato.stanford.edu/entries/montesquieu/#4 (accessed on 26th May 2011). There is a separation of powers doctrine in the text of the Constitution of Kenya 2010, particularly in relation to the structure of the Constitution and the drafting of Chapters 8, 9 and 10 which vest legislative, executive and judicial power respectively in separate arms of the government.
[45] Karl Loewestein, Political Power and the Government Process, 2nd edn, [Chicago, The Universities of Chicago Press, 1965],Pp.34-35
[46] Vile MJC, Constitutionalism and the Separation of Powers (Indianapolis: Liberty Fund, 1998, 2nd ed.), pp.3, 36-37, 52.

judicial-were often combined in the person of one and the same magistrate. Probably the intrinsic reason for this defect was that neither the Greek polis nor the Roman republic recognized any rights of the individual. The political ethics of the ancients did not therefore call for a separation of functions and their assignment to different state organs.[47]

The more common narrative of the doctrine of "the separation of powers" is derived from Montesquieu whose elaboration of it was based on a study of John Locke's[48] writings and an imperfect understanding of the eighteen century English Constitution.[49] The two derived the contents of the doctrine from developments in the British constitutional history of the early 18th century and gave it a base on which modern attempts to distinguish between legislative, executive and judicial power is grounded.

In England, after a long war between Parliament and the King, Parliament triumphed in 1688 which gave it legislative supremacy culminating in the passage of the Bill of Rights.[50] This led ultimately to a recognition by the King of legislative and tax powers of Parliament and the judicial powers of the courts. At that time, the King exercised executive powers, Parliament exercised legislative

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[47] supra note 44.
[48] Locke, John :- ( 29 August 1632-28 October 1704) was an English philosopher and his major work was "Two Treaties of Government".
[49] Hoo P.O, Constitutional and Administrative Law 6th edition 1978. Sweet and Maxwell Limited; London, p. 14.
[50] The Act is cited as The Bill of Rights in the United Kingdom, as authorised by section 1 of, and the First Schedule to, the Short Titles Act 1896. Owing to the repeal of those provisions, it is now authorised by section 19(2) of the Interpretation Act 1978. In the Republic of Ireland, it is cited as The Bill of Rights 1688, as authorised by section 1 of, and the First Schedule to, the Short Titles Act 1896 (as amended by section 5(a) of the Statute Law Revision Act 2007). The short title of this Act was previously "The Bill of Rights".

powers and the courts exercised judicial powers, though later on England did not stick to this structural classification of functions and changed to the parliamentary form of government.[51]

John Locke was an apologist of the revolution of 1688 and justified the supremacy of the legislative power, but considered that, 'because the legislature was not permanently in session and because legislators might exempt themselves from obedience to their own laws, legislation and the execution of the laws were in distinct hands in all well-moderated monarchies and well –framed governments.'[52] By the executive Locke meant primarily what we should call the judiciary, but he recognized a third kind of function, which he called the 'federative' and which involved the carrying of external relations.[53]

Montesquieu unlike Locke realized that the law could be a tool of oppression and made more practical recommendations for the organization of government to ensure the liberty of the subject. He begins with a classification of the functions of government: 'In every government there were three sorts of power; the legislative, the executive in respect of matters involved in the law of nations and the executive in respect of matters of domestic Law'.[54] However, the third

[51] Massey I.P. Administrative Law. 5th edition 2001. Eastern Book Company; New Delhi, p. 33.
[52] John Locke, Second Treatise, s. 144 "But because the Laws, that are at once, and in a short time made, have a constant and lasting force, and need a perpetual Execution, or an attendance thereunto: Therefore 'tis necessary there should be a Power always in being, which should see to the Execution of the Laws that are made, and remain in force. And thus the Legislative and Executive Power come often to be separated."
[53] Ivor J.W, The Law and the Constitution, 3rd edn, [London, University of London Press Ltd, 1945] p.20
[54] Locke, J Two Treatises on Government (1680-1690) Book II Chapter12.

function, under which the magistrate punishes criminals or decides disputes between individuals, is then immediately re-named as 'the power of judging'.[55] A little later the three functions are that of making laws, that of executing public affairs, and that of adjudicating on crimes or individual causes. In this sense, the executive function apparently refers to internal affairs as well as external relations, and so the definitions seem to correspond to the modern use of the terms 'legislative', 'executive' and 'judicial'.[56] Montesquieu carried the argument further by stipulating that there should be three branches or agencies of government to correspond to the three functions:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... Again, there is no liberty if the power of judging is not separated from the legislative and executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. If it were joined to the executive power, the judge might behave with violence and oppression. These would be an end to everything , if the same man, or the same body, whether of the noble or of the people., were to exercise those three powers, that of enacting laws, that of executing public affairs, and that of trying crimes or individual causes.[57]

This led ultimately to recognition by the king of legislative and tax powers of parliaments and the judicial powers of the court. At that time, the king exercised executive powers, parliament exercised legislative powers, though later on England did not stick to this structural classification of functions and changed

[55] Ibid.
[56] Munroe, C R., Studies in Constitutional Law, [London, Butter worths,1987] pp 190-191.
[57] Holdsworth,Sir W, A History of English Law, Vol X [1938] pp 713.70.

### 3.3 Checks and balances

In arbitrating disputes arising out of national security, courts inevitably raise the ire of executives. Similarly when courts strike down legislation for unconstitutionality or any other ground the Legislature may be irked. In the case of national security, the Executive has institutional competence to anticipate and confront all threats to national security so that judicial review that counters executive conduct is problematic. In reaction the Executive may sponsor legislation to overturn or simply decline to execute the ruling. In all instances, the court would be reinforcing Rule of Law by checking Executive excesses. Checks and balances provides a framework for this thesis by highlighting decisions that test the tensions that arise as each arm exercises constitutional control of the other.

James Madison wrote that the three branches "should not be so far separated as to have no constitutional control over each other."[58] The system of checks and balances is designed to allow each branch to restrain abuse by another branch. Central to this project is the role of courts in checking the executive branch through judicial review by the Supreme Court under Article 163(4)[59] and the High Court under Article 165(3)(b) and (d).[60] The purpose of judicial review is to

[58] Madison, J. (1788). "These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other." The Federalist No 48. New York Packet Friday, February 1, 1788.

[59] Under (4) Appeals shall lie from the Court of Appeal to the Supreme Court—
(a) as of right in any case involving the interpretation or application of this Constitution; and
(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).

[60] Under 165. (3) Subject to clause (5), the High Court shall have—

ensure that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large.[61]

Whereas the power to determine the question whether any law is inconsistent with or in contravention of this Constitution is the judiciary's most meaningful tool in checking and balancing the exercise of power by the political arms, it as well forms the core of the countermajoritarian dilemma.

As early as 1962 in the United States, the proposition that judicial review was a "deviant institution in the American democracy" was advanced by the opinion that[62] '[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representatives of the actual people of the here and now.'[63]

As well, it is thought by many to be undemocratic: committing the community "now" to the judgments of the community "then," and concentrating power in the

(a) unlimited original jurisdiction in criminal and civil matters;…
(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;…
(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
(i) the question whether any law is inconsistent with or in contravention of this Constitution;
(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
(iv) a question relating to conflict of laws under Article 191.

[61] *Republic v Permanent Secretary/Secretary to the Cabinet and Head Of Public Service Office of The President & 2 Others ex-parte Stanley Kamanga Nganga* [2006] eKLR.

[62] Bickel, A M The Least Dangerous Branch 18 (1962) p.16.

[63] Id at 16-17.

hands of judges who are not subject to oversight, and have no particular expertise in resolving what are, at root, questions of political morality.[64]

For juristocracy, it has been argued by Robert A. Dahl that worries about juristocracy are far-fetched since judicial review rarely presented significant counter-majoritarianism problems and that 'it would appear somewhat unrealistic to suppose that a court whose members are recruited in the fashion of Supreme Court justices would long hold to norms of right or justice substantially at odds with the rest of the political elite.'[65]

It has also been postulated by Barry Friedman that decisions on constitutional matters by courts were typically consequences of dialogues between courts and elected officials. As a consequence therefore, the perception of judicial decisions as being counter majoritarian or otherwise depended more on the political and intellectual climate of the time than on pure legal reasoning.[66] In support Frank Michelman has notably referred to the Supreme Court as a "forum of principle" where judges are endowed with special capacity to listen to the voices from the margins normally overlooked in majoritarian democracy.[67] Judges who do not have to cater to constituents with particular demands are more free to decide

[64] Miller, B W Review Essay: A Common Law Theory of Judicial Review, W J Waluchow (Cambridge: Cambridge University Press, 2007) p. 297.
[65] Dahl, R A., Decision-Making in a Democracy: The Supreme Court as a National Policy Maker, 6 Journal of Public Law (1957) p.279, 291.
[66] Friedman, B (1993) "Dialogue and Judicial Review," 91 MICH .L. REV. 577, 653-55.
[67] Michelman, Frank (1888) "Law's Republic", 97 YALE L.J. 1493,1537.

cases on principle than are politicians who must always keep in mind that they have to be (re) elected.[68]

In the United Kingdom, the judicial branch is not only autonomous, but arguably performs the functions of the other branches since, 'every new meaning conferred on a word, every application of a rule to a new situation, whether by way of statutory interpretation or under common law, 'creates' new law.'[69] This function of the judiciary is clearly illustrated by the case of *Magor and St. Mellons Rural District Council v Newport Corporation (1965)* where Lord Denning's answer to the accusation of Lord Simond of 'naked usurpation of the legislative function' was; 'The court, having discovered the intention of Parliament and Ministers too, must proceed to fill in the gaps. What the legislature has not written, the court must write.'[70]

Barnett sees this as a 'constitutional partnership' between the legislative and judiciary as when judges make law, parliament may 'tactically' approve by not interfering with it. But the UK also has a long intellectual tradition of opposing any enhancement of judicial power in the name of protecting rights. Jeremy Bentham was a firm believer in the value and importance of strong parliamentary government, and was deeply sceptical about the desirability (and indeed, ability)

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[68] Hilbink, Lisa (2006), "Beyond Manicheanism: Assessing the New Constitutionalism," 65 Maryland Law Review at 25

[69] Barnett, H Constitutional and Administrative Law. 7th ed. - London ; New York : Routledge-Cavendish, 2017.p 90

[70] [1965] AC 1175.

of judges to supervise or limit what parliament decides to do. He issued the following stark warning:

> Give the judges the power of annulling [Parliament's] acts; and you transfer a portion of the supreme power from an assembly which the people have had some share, at least, in choosing, to a set of men in the choice of whom they have not had the least imaginable share.[71]

The scepticsm by Bentham in the 19th century has survived the 20th and 21st centuries.[72] In fact, David Dyzenhaus suggests that we are experiencing a:

> neo-Benthamite revival…[which is] part of an attempt in legal and constitutional theory to focus attention on legislatures rather than the courts… The revival claims that Parliaments in vigorous democracies protect human rights better than courts and that trust in judges to resolve political disputes results in the capture of our political processes by elites and thus in 'democratic debilitation'.[73]

From New Zealand, it has been argued by Sir G.W.R Palmer that whereas juristocracy gives a political role to judges to strike down legislation that violates the Constitution, that step might threaten the stability and respect that the judicial system enjoys and decisions may be unpredictable where they are not grounded on precedent.[74] He further argues that judges should not be let loose on the broader aspects of social policy to alter in significant ways fiscal policy,

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[71] Fragment on Government (Cambridge, 1988) ch IV, para 32. For further discussion of Bentham's scepticism both in relation to rights and the courts, see Lord Hoffmann, 'Bentham and Human Rights' (2001) 54 CLP at 61.

[72] eg, see J Griffith J, The Politics of the Judiciary (Fontana, 1997); T Campbell, K Ewing and A Tomkins (eds) Sceptical Essays on Human Rights (Oxford Univeristy Press: Oxford, 2001).

[73] Dyzenhaus, D, 'The Genealogy of Legal Positivism' (2004) 24 OJLS 39, 62. For the term 'democratic debilitation', see M Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter Majoritarian Difficulty' (1995) 94 Michigan Law Review at 245.

[74] In Palmer GWR, "A Bill of Rights for New Zealand?" in K.J.Keith (ed) Essays on Human Rights (Sweet & Maxwell (NZ) Ltd Wellington, 1968) 106-131.

taxation policy, education, health, social welfare policy or any other broader political issues that consist the stuff of politics.[75]

### 3.4. Constitutional Interpretation

In judicial review of executive conduct the phenomenon of "gate keeper judges" raises the question personal preferences and personal values as influencers of judicial outcomes. In older judiciaries such as the United States and The United Kingdom these would be jurisprudential philosophies and interpretational doctrines. Such factors and many other variables could exhibit in the judiciary in Kenya. It is an interesting exercise to observe Justice Joseph Onguto in the judiciary and Prof. James Gathii in the academy forcefully carve out jurisprudence that reflects certain values. Personal preferences and values as determinants of constitutional interpretation will provide another framework for this thesis.

There are a variety of approaches in interpreting the Constitution in terms of the sources of guidance relied on. These represent forms of argument that have been used often enough by individual judges over the Court's history to be regarded as at least minimally acceptable techniques for judicial self-explanation. On the matter of constitutional interpretation one can perhaps make at least two cautious generalizations. First, among all the acknowledgments that a judge's personal preferences and value system inevitably influence decisions, one so

[75] Palmer, Sir G Rt Hon; "The Bill of Rights Fifteen Years On" Keynote Speech-Ministry of Justice Symposium: The New Zealand Bill of Rights Act 1990.

seldom sees an opinion explicitly relying on them that it can be assumed that they are not considered legitimate authority for any decision. Second, the source of authority most frequently relied on is and has been precedent, the Court's (or particular justices') own prior opinions.

In Kenya, the task of constitutional interpretation ultimately falls on the judiciary. The Supreme Court has in *Erad Suppliers and General Contractors* noted:

> the fact that both the Constitution and the accompanying statutes and rules, which are new instruments, will for some time be the subject of basic interpretations and, essentially, unless initiatives are taken within other institutions than the Judiciary, it will be the responsibility of the Court to fix the operative meanings of the relevant provisions.[76]

On the matter of how constitutional interpretation is to be approached the long dominant position has been that expressed by Sir Charles Newbold, formerly President of the East African Court of Appeal, when he said:

> the courts derive a considerable amount of their authority and perhaps even more (important), the acceptance of their authority, from their independence of the Executive, from their disassociation from matters political. In a democracy … the determination of matters political … rests ultimately with the will of the people through the ballot box…[77]

This advances the proposition that for the courts to remain independent of the executive, they must keep off policy matters that are the preserve of the political

[76] *Erad Suppliers & General Contractors Limited V National Cereals & Produce Board* [2012] eKLR.
[77] above note 56.

arms elected by the people expressed through democratic processes. The implication is that courts by their very nature lack the legitimacy to attend to matters political and doing so erodes the legitimacy of judicial outcomes. This is best illustrated by the last part of the statement as follows:

> For that purpose the people elect the executive and the legislature and it is on these two branches…that the primary responsibility rests. The third branch…the Judiciary is not elected and should not seek to interfere in a sphere which is outside the true function of the judges…it is the function of the courts to be conservative, so as to ensure that the rights of the individual are determined by the rule of law.[78]

This basic creed of judicial restraint found expression in *Republic v. El Mann*[79] when Chief Justice Kitili Mwendwa stated that "in one cardinal respect, we are satisfied that the Constitution is to be construed as any other legislative enactment." This line of judicial thinking became institutionalized later finding expression mostly in cases challenging detention without trial.[80]

The decision in *Republic vs. El Mann*[81] has come to be known as the *El Mann Doctrine* and has largely been construed to say that the Constitution should be construed like any other ordinary statute. Whereas it has been argued that the

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[78] Sir Charles Newbold in Dodhia supra note 96 The role of the jugde as a policy maker: [1969] 2 EALR .127.

[79] (1969) EA 357 (sitting with Farrel and Channan Singh JJ). See also *Charles Young Okany v Republic* Criminal Case 1189 of 1979(unreported)

[80] In *Republic v. Commissioner of Prisons ex parte Kamonji Wachira, Edward Akongo Oyugi and George Moseti Anyona* HCCC 60 of 1984 (unreported) the court reaffirmed its reluctance to look into the validity of detention orders. In *Raila Odinga v. Attorney General* HCCC Miscellaneous Application No 104 of 1986 the court at any point the applicant acknowledges the sufficiency of the reasons on which the detention was based he was forever precluded from requiring further particulars.

[81] supra

decision in that case made no such claim,[82] it reiterated two cardinal principles of interpretation; that the Constitution will be given a liberal interpretation in certain contexts where the words used are ambiguous and imprecise and where the words used are precise and unambiguous they will be construed in their literal meaning. The holding in *Republic vs. El Mann* had for long been viewed as a sound and valid approach to constitutional interpretation,[83]and that it was not extinguished or expunged by either the Ringera J (as he then was) or Kasango J's decision in the *Rev. Timothy Njoya & Others vs. The Constitution of Kenya Review Commission and Other* case.[84]The doctrine was also adopted in the *Dr. Murungaru Vs. Kenya Anti-Corruption Commission* case barring prosecution of the applicant.[85]

The Constitution of Kenya 2010 has now set to rest questions over the standard and the judicial mandate to interpret the Constitution and courts can no longer be constrained by such a limited perspective of procedure. The mandate is in the terms of the Constitution, which provides at Article 1(1)] that –"All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution." The broad scheme of the Supreme Court's interpretive approach is laid out in the Supreme Court Act, 2011 (Act No. 7 of 2011), section

[82] *Jesse Kamau & 25 Others V Attorney General* [2010] eKLR.
[83] Infra.
[84] *Rev. Timothy Njoya & Others vs. The Constitution of Kenya Review Commission and Other* [2004]1 K.L.R.232.
[85] *Dr. Murungaru Vs. Kenya Anti-Corruption Commission* (Nairobi H.C. Misc. Application No. 54 of 2006 (O.S.).

3(c): "…[to] develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth…"

The court in addressing actual disputes must begin from the terms and intent of the Constitution. The court's perception of the separation-of-powers concept must take into account 'the context, design and purpose of the Constitution; the values and principles enshrined in the Constitution; the vision and ideals reflected in the Constitution.'[86]

The Constitution of Kenya 2010 is a transformative charter. Unlike the conventional "liberal" Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today's Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on:

> "RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law."

This clause principle is fleshed out in Article 10 of the Constitution, which specifies the "national values and principles of governance", and more particularly in Chapter Four (Articles 19-59) on the Bill of Rights. The transformative nature reconfigures the power relations between the three arms

[86] *In The Supreme Court Of Kenya Advisory Opinion No 2 Of 2013. -The Speaker f The Senate & Anor –The Attorney-General & Anor & LSK & Others.*

of government to achieve dominant perceptions of legitimacy. A depiction of this scenario was made by referring to the unique processes of constitution-building in South Africa where Karl Klare wrote:

> "At the most superficial level, South Africans have chosen to compromise the supremacy of Parliament, and correspondingly to increase the power of judges, each to an as-yet unknowable extent."[87]

The scholar stated the object of this South African choice:

> By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.[88]

The Constitution of Kenya provides that "justice shall be administered without undue regard to procedural technicalities"[89] and that "the purposes and principles of this Constitution shall be protected and promoted".[90] Article 10 also provides for "national values and principles of governance"; which require that "all State organs, State officers, public officers and all persons" shall be bound by these, whenever any of them –

> "(a) applies or interprets the Constitution;
>
> (b) enacts, applies or interprets any law; or

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[87] In his article, "Legal Culture and Transformative Constitutionalism, "South African Journal of Human Rights, Vol. 14 (1998), 146 at 147.
[88] Note 119 above
[89] Article 159(2) (d).
[90] Article 159(2) (e)

(c) makes or implements public policy decisions."

From the foregoing, the judiciary is obliged to incorporate such values in executing their interpretative mandate. On the other hand, Kenya's legislative and executive organs bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation.

The Constitution, however, vests the legislative authority of the Republic in Parliament and executive authority on the executive. Such authority is derived from the people.[91] This position is embodied in Article 94(1) and 130(1) thereof. Article 94(1) and 129(1) respectively also impose upon Parliament and the Executive a duty to protect the Constitution and to promote the democratic governance of the Republic. The two organs cannot operate besides or outside the four corners of the Constitution.

On constitutional interpretation the US Supreme Court in *Marbury* held that being the apex judicial organ in the land neither the legislature nor the executive could invoke institutional competence or the doctrine of separation of powers to avoid its constitutional duty. The court was persuaded by the reasoning in the cases referred to from other jurisdictions to the effect that Parliament and the Executive must operate under the Constitution which is the supreme law of the land.[92]

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[91] Article 1(1)

[92] *Marbury v. Madison*, 5 U.S. 137 (1803), where Marshall, C.J. thus held:

### 3.5. Judicial review

The entry point that enables the judiciary to exercise its mandate and to express itself on national security questions under all the foregoing doctrines is by the exercise of judicial review under the Constitution and Fair Administrative Action Act. Judicial review is a term which could imply one of many motions which will be distinguished in Chapter Two. Of concern to this thesis if judicial review under the constitution to explain the empowerment of the judiciary by the constitution to question executive conduct. On the surface, this looks procedural but a more anxious analysis reveals the motions that play out in a checks and balances system involving the three arms of government. The matrix of checks and balances that exhibits during judicial review is the final framework of this thesis.

One of the greatest contributions of the American system to the Constitution of Kenya is the concept of judicial review enunciated in *Marbury vs. Madison.*[93] This concept rests on the extraordinary foundation of Article 1(1) which states : "All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution." The Constitution is the supreme law. It was ordained by the people, the ultimate source of all political authority. It confers

> "So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
> "If then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislatures, the Constitution, and not such ordinary act, must govern the case to which they both apply."

[93] 5 U.S. 137; 1 Cranch 137; 2 L. Ed. 60; 1803 U.S. LEXIS 352.

limited powers on state organs.[94] If the state organs consciously or unconsciously overstep these limitations there must be some authority competent to hold them in control, to thwart their unconstitutional attempt, and thus to vindicate and preserve inviolate the will of the people as expressed in the Constitution. This power the courts exercise on the strength of Articles 159(1)[95]and 165(3)(d)[96].

John Adams once defined a "republic" as "a government of laws and not of men."[97] Even Adams would acknowledge, however, that laws must have their limits, and that men, as the makers and interpreters of laws, must necessarily define what those limits are.[98] Indeed, in the American legal system, the idea

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[94] (2) The people may exercise their sovereign power either directly or through their democratically elected representatives.
(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—
(a) Parliament and the legislative assemblies in the county governments;
(b) the national executive and the executive structures in the county governments; and
(c) the Judiciary and independent tribunals.

[95] 159. (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.

[96] (3) Subject to clause (5), the High Court shall have— (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
(i) the question whether any law is inconsistent with or in contravention of this Constitution;
(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter
relating to the constitutional relationship between the levels of government;

[97] Mass. Const. of 1780, art. XXX; John Adams, Novangus (1774), reprinted in 4 The Works of John Adams 99, 106 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1969) (1856); see also THOMAS PAINE, Common Sense, reprinted in Common Sense, The Rights of Man, and other Essential Writings of Thomas Paine 23, 48-49 (Sidney Hook ed., NAL Penguin Inc. 1969) (1776) ("But where, says some, is the King of America? I'll tell you. Friend, he reigns above, and doth not make havoc of mankind like the Royal Brute of Britain. Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter; let it be brought forth [and] placed on the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far we approve of monarchy, that in America THE LAW IS KING.").

[98] See Adams J, Thoughts on Government (1776), reprinted in The Works of John Adams, supra note 159, at 193, 198 (describing the division of power between the three branches of

that the judiciary can invalidate legislation that directly contradicts the Constitution has become an almost axiomatic constitutional directive. Not only does the Constitution itself implicitly support this position,[99] but the nullification of unconstitutional laws is also consistent with America's early political climate, which emphasized contractual constraints upon government authority[100] and the necessity of limited government power.[101]

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government to prevent any branch from surpassing the constitutionally imposed limitations on its power ("[T]he judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that.")). In fact, Professor Scott Gerber notes that the Framers, particularly those in Virginia, relied on John Adams's early writings about the judiciary's role in keeping lawmakers within their proper bounds in canonizing the state courts' power of judicial review. Scott D. Gerber, The Political Theory of an Independent Judiciary, 116 YALE Law Journal. POCKET PART 223, 228 (2007), http://thepocketpart.org/2007/01/09/gerber.html.

[99] See U.S. CONST. art. VI, § 1, cl. 2 ('This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); see also THE FEDERALIST No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ('The Constitution ought to be preferred to the statute ..".)..

[100] See, e.g., Wood G S, The Creation of the American Republic, 1776-1787, at 268-70 (1969) (discussing the notion of constitutions as contracts that limit the powers that the government may properly exercise).

[101] See Amar A R, America's Constitution: A Biography 60 (2005) ("Jefferson and Madison aimed to structure government power so as to promote compliance with the specific legal rights and rules established by the underlying state or federal constitution itself. Thus Jefferson spoke of enforcing the legal limits' on each part of government, and Madison claimed that the federal Constitution's very structure would maintain the rules laid down in the Constitution,' would keep the branches in their constitutionally 'proper' places, and would thus safeguard 'public rights' and 'the rights of the people' against improper 'encroachments."').

## 4. Literature Review

### 4.1. Expansion of judicial power

It has been noted that Juristocracy[102] is a growing trend worldwide because as of 2011, more than seventy-two percent of the world's constitutions gave courts the power to review the constitutionality of laws.[103] Several theories have been propounded to explain the unprecedented levels of judicial empowerment. Traditionally, rule of law, separation of powers and the prominence of human rights have provided the main justifications to the recognition of judicial review.[104]

Theories have been advanced that view judicial review as an "insurance" scheme whereby risk-averse politicians in electorally competitive states opt to establish strong and independent courts as alternative forums for challenging executive authority if and when they are not in power.[105] An alternative view holds the expansion of the institution of constitutional review to be a result of international norm diffusion where states attempt to emulate developments in other countries

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[102] Juristocracy is also referred to in a narrower sense as judicial activism. Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." As quoted in "Takings Clause Jurisprudence: Muddled, Perhaps; Judicial Activism, No" DF O'Scannlain, Geo. JL & Pub. Pol'y, 2002. Political science professor Bradley Canon has posited six dimensions along which judge courts may be perceived as activist: Bradley C. Canon – "Defining the Dimensions of Judicial Activism," Judicature, 66.6, 1983.

[103] see Tom Ginsburg & Mila Versteeg, Why Do Countries Adopt Constitutional Review?, *The Journal of Law, Economics, and Organization*, Volume 30, Issue 3, 1 August 2014, Pages 587–622.

[104] Shapiro M & Alec Stone Sweet, On Law, Politics, And Judicialization (Oxford University Press 2002) 149, 151–56; Tom Ginsburg, The Global Spread of Constitutional Review (The Oxford Handbook of Law and Politics 2008) 81, 82.

[105] Ginsburg T, Judicial Review In New Democracies: Constitutional Courts In Asian Cases (Cambridge University Press2003) 2–4; Hirschl R, Towards Juristocracy: The Origins and Consequence of the New Constitutionalism( Harvard University Press 2004)1–2.

since various forms of constitutional review "have spread into every corner of the globe and into every level of political association."[106]

The spread of constitutional review has raised strong objections based on perceived lack of democratic legitimacy of courts to review the constitutionality of legislative or executive power.[107] Although it is now without question that judicial review poses the 'Countermajoritarian difficulty',[108]the Constitution of Kenya 2010 confers judicial review power on the High Court in Article 165(3) and the Supreme Court the power to provide guidance to political organs through advisory opinions.[109]These articles are the bases of judicial review and anathema to executive power.

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[106] Corrado M L, Comparative Constitutional Review: Cases And Materials (Carolina A ademic Press 2004) xvi.

[107] The "democratic objection" opposes as illegitimate and inappropriate the power of unelected judges to review the constitutionality of laws. Alexander Bickel noted, because constitutional review allows unelected judges to control the choices of elected majorities, the process raises the "countermajoritarian" dilemma or difficulty. Alexander Bickel, The Least Serious Branch: The Supreme Court at the Bar of Politics (Yale University Press1986) 16. The democratic objection is perhaps the most prominent theoretical objection to the practice of constitutional review. In addition, some scholars oppose the power of courts to adjudicate socio-economic rights on grounds of competence. See Pilar Domingo, Introduction, in Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?( Taylor and Francis Ltd (2006)1, 2.

[108] Stone A, Abstract Constitutional Review and Policy Making in Western Europe, in Comparative Judicial Review and Public Policy (Donald W. Jackson & C. Neal Tate eds.,1992)41, 55. Since the end of World War II, there has been a worldwide convergence toward U.S.-style judicial supremacy—or what some observers now call "juristocracy." In both long-established and new democracies, as Ran Hirschl shows in his book *Towards Juristocracy* (2004), constitutional reforms have taken political power away from elected politicians and shifted it to unelected judges. When democracies were established in Southern Europe in the 1970s, in Latin America in the 1980s, and in Central and Eastern Europe and South Africa in the 1990s and Kenya in 2010, they almost all included a strong judiciary and a bill of rights.

[109] See Article 163(6) The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.

Executive power is the predicament of our times.[110] Although the Constitution of Kenya 2010 sought to prevent unchecked executive authority, there have been more frequent and powerful suggestions that the executive branch must be free to make decisions beyond the scrutiny of the courts.[111] But the Constitution does not define the scope of executive authority which raises the question of when the executive may act without express constitutional or statutory authority.[112]

In addressing itself to the question of the scope of executive authority, the United States Supreme Court has over the years grappled with but failed to adopt a consistent approach to the consequences of this imprecision. In some cases, the court focused solely on whether the legislature had disapproved the executive's conduct.[113] In other instances, the court was only concerned whether there was explicit statutory or constitutional authority for the President's actions.[114]In still other situations, the court looked to whether the President's behaviour usurped

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[110] See Hornsby C (1989) "The Social Structure of the National Assembly in Kenya, 1963-83," in The Journal of Modern African Studies, Vol. 27, No. 2, at p. 275, where Yash Ghai, Okoth-Ogendo, Githu Muigai, Walter Oyugi, Mutakha Kangu, Charles Hornsby (1989), and others note that both under President Jomo Kenyatta and President Daniel Arap Moi, Kenya was increasingly dominated by the institution of the Presidency and the authorities of the other organs of government were seriously weakened.

[111] In the Supreme Court of Kenya. *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others* [2013] eKLR Advisory Opinion Reference No. 2 of 2013. At para [255]" It is my considered view that judicial resolution is not appropriate where it is clear in a matter such as this that the political question doctrine will apply."

[112] This has been a persistent issue in Kenya and even in the more established democracies such as the United States of America. See e.g, Hurtgen, The Case for Presidential Prerogative, 7 U. TOL.L. REV.59,65-73(1975)(discussing the use of inherent emergency powers by past presidents); Note, The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability, 52 S. CAL.L.REV.1453,1481-87(1979)(arguing that inherent emergency powers for the president do exist).

[113] See, e.g. *Goldwater v Carter*, 444 U.S. 996, 997-98 (1975) (mem)(Powell, J.,concurring) (since congress had not officially rejected the President's claim of inherent authority to rescind the treaty with Taiwan, the issue was not ripe for judicial review).

[114] See e.g., *Youngstown Sheet and Tube Company v Sawyer*, 343 U.S. 579, 585 (1952)(President's power must come from either the Constitution or an act of Congress).

the prerogatives of other branches of government.[115] And in some decisions, the court even upheld broad, extra constitutional Presidential powers.[116]From these authorities, it is evident that even in the United States the judiciary has resolved challenges to executive authority "on an ad hoc basis, without resort to any fundamental principle…"[117] Given the often harsh results of invocation, one might expect clear constitutional and statutory bases for executive authority.

A preliminary consideration with respect to a court's competence to review executive authority is whether challenges to such authority are justiciable. Two justiciability principles, the political question doctrine and the standing doctrine, pose potential obstacles to judicial review.[118]

The political question doctrine is invoked by courts to avoid ruling on a matter whose resolution is committed to another branch.[119] Some commentators, notably Professor Jesse Chopper, suggest that the courts should treat all challenges to inherent executive powers as political questions.[120]It has been

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[115] See, e.g., *United States v Nixon*, 418, U.S. 683, 707,712, (1974) (legitimate needs of judicial process and the courts may outweigh Presidential privilege).
[116] See e.g., *United States v Curtiss Wright Corp.*, 299 U.S. 304, 318-19 (1936) (President's powers over international affairs not found in grants of the Constitution, but in the law of nations).
[117] Winterton, The Concept of Extraconstitutional Executive Power in Domestic Affairs, 7 HASTINGS CONST. L.Q. 1, 20 (1979)
[118] Casper, Constitutional Constraints on the Conduct of Foreign and Defence Policy: A Non-judicial Mode, 43 U. CHI. L. REV. 463, 488 (1976). See also Frohmayer, The Separation of Powers: An Essay on the Vitality of a Constitutional Idea, 52 OR. L. REV. 211, 218-19 (1973) (it is fruitless to seek a full understanding of the Separation of Powers Doctrine from the text of the Constitution).
[119] Tribe, L., American Constitutional Law (The Foundation Press Inc (1978) at 71-13. See also Firmaye, The War Powers and the Political Question Doctrine, 49 U. COLO. L. REV. 65 68-78 (1977) (tracing the development of the political question doctrine in the caselaw).
[120] Chopper, J Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (University of Chicago Press June 1980) 263, 298.

argued that this approach inevitably leads to a tremendous increase in the power of the executive and lack of accountability.[121]

Standing on the other hand is the question whether a party is affected and requires that a party seeking to invoke a court's jurisdiction must allege a stake in the outcome to ensure cases are brought by the proper parties.[122]Policy considerations have also led to adoption of other standing barriers such as "generalized grievances" where a litigant must assert a grievance which is peculiar to himself or a group to which he is part.[123]

### 4.2. Against judicial review

American legal theorists Jeremy Waldron and Mark Tushnet have advanced the view that judicial review is unnecessary,[124] and democratically illegitimate.[125] Building on Alexander Bickel's[126] counter-majoritarian theory that judicial

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[121] Tigar, Judicial Power, the "Political Question Doctrine," and Foreign Relations, 17 U.C.L.A. L. REV. 1135, 1142(1970).

[122] Homburger, Private Suits in the Private interest of the United States of America, 23 BUFFALO L. REV. 343, 388 (1976).

[123] *Gladstone Realtors v Village of Bellwood*, 441, U.S. 91, 99-100(1979).

[124] Tushnet M V, Taking The Constitution Away From The Courts, (New Jersey: Princeton University Press, 1999), 154 ("[d]oing away with judicial review would have one clear effect [i]t would return all constitutional decision making to the people acting politically."); Noting that United States senators may raise a constitutional point of order regarding any bill under consideration, Tushnet also challenges the idea that constitutional courts are the only body equipped to place constraints on political branches through review of legislation for constitutionality. Mark V. Tushnet, "Non-Judicial Review," http://www.law.harvard.edu/students/orgs/jol/vol40_2/tushnet.pdf (accessed October 17, 2014), 454-458.

[125] Jeremy Waldron, argues "judicial review of legislation is inappropriate as a mode of final decision making in a free and democratic society," he admits, however, that where democratic and legislative institutions are not in "good shape so far as political equality is concerned," the arguments against judicial review do not go through. "The Core of the Case against Judicial Review," 1348-1353, 1401-1402. http://www.law.harvard.edu/news/2008/05/Waldron.pdf (accessed October 17, 2014).

[126] Bickel AM , The Least Dangerous Branch: The Supreme Court at the Bar of Politics, 2d edition (New Haven: Yale University Press, 1986), 16-17. ("[J]udicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a

review permits unelected or otherwise unaccountable officials-judges, to "tell[] the people's elected representative that they cannot govern as they like,"[127] Waldron and Tushnet develop provocative arguments against judicial review as working against popular constitutionalism.

Popular Constitutionalism advances the idea that "we all ought to participate in creating Constitutional law through our actions in politics."[128] For Waldron, judicial review endangers popular constitutionalism because "…it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights."[129]

Erwin Chemerinsky, a supporter of judicial review, opines that for the popular constitutionalist, popular constitutionalism requires the elimination or scaling back of judicial review to demonstrate a "commitment to majoritarianism…a deference to all elected officials at all levels of government" who are elected to represent the will of the people.[130]

In short, popular constitutionalists appear to share Ran Hirschl's view: judicial review represents a constitutional experiment that has failed, that judicial review

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legislative act. . . .it thwarts the will of representatives of the actual people of the here and now. . . .").

[127] Ely J H, Democracy and Distrust: A Theory of Judicial Review (Massachusetts: Harvard University Press 1980), 4.

[128] Tushnet, Taking the Constitution Away from the Courts, (Princeton University Press 200) 157.

[129] Waldron, "The Core of the Case against Judicial Review," 115 Yale L.J. (2006). 1353.

[130] Chemerinsky E, "In Deference of Judicial Review: The Perils of Popular Constitutionalism," 673 University of Illinois Law Review, 690 (2004): 677-679.

has created a Juristocracy due to the transfer of "an unprecedented amount of power from representative institutions to judiciaries."[131]

Undoubtedly, the central function of popular constitutionalism is democratic because it champions sovereign rule through public participation in representative governing, through which the will of the public majority finds expression. However, the central function of popular constitutionalism is also its central problem because majority rule left unchecked by judicial review through the annulment of legislative or executive actions deemed to violate the Constitution results in tyranny of the majority.[132]

### 4.3. For Judicial review

Is judicial review counter-majoritarian? Put another way, is the practice of judicial review undemocratic? John Hart Ely advances the proposition that judicial review does not go against popular constitutionalism and is not counter-majoritarian, arguing that "since the Constitution itself was submitted for and received popular ratification…judges do not check the people, the Constitution does, which means the people are ultimately checking themselves."[133] He describes two (2) theoretical concepts of judicial review, interpretivisim and

[131] Hirschl R, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Cambridge: Harvard University Press, 2004), 1.
[132] For a discussion of the view that "tyranny of the majority" is a misnomer, see Waldron, The Core of the Case against Judicial Review,( 115 Yale Law Journal 2006) 1395-1401.
[133] Paul N. Cox, John Hart Ely, Democracy and Distrust: A Theory of Judicial Review,15 Val.U. L. Rev. 637 (1981) 8.

noninterpetivisim that support popular constitutionalism—civic participation in creating public value, as follows:

Interpretivisim calls for judicial reliance on the provisions within the four (4) corners of the Constitution to interpret and apply legislative and executive actions in balancing competing interests, whereas, non-interpretivisim calls for judicial reliance on outside factors in addition to the provisions within the four corners of the Constitution.

Since interpretivisim requires judges to "confine themselves to enforcing norms that are stated expressly in the Constitution," arguably, it is not counter-majortarian but rather is consistent with representative democracy.[134] Also, upon further analysis, because as Ely discloses several constitutional provisions, it invites the justices to look beyond its four (4) corners[135] when making difficult substantive choices among competing fundamental values and principles.[136] The dichotomy between interpretivisim and non-interpretivism disappears, and with it, the notion that judicial review undermines public participation in creating and interpreting constitutional law and creating public value for all becomes suspect.

According to Ely, judicial review looks to the Constitution and locates permission in its express provisions to imply "a line of growth intended, [to] identify the sorts

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134 Ibid., 1-2.
135 Ely, Democracy and Distrust: A Theory of Judicial Review, 13-14.
136 Ibid., Quoting Alexander Bickel, Ely writes "The Court is 'an institution charged with the evolution and application of society's fundamental principles," and its "constitutional function," accordingly, is "to define values and proclaim principles," 43.

of evils against which the provision was directed and to move against their contemporary counterparts."[137]

### 4.4. Judicial Review of National Security Cases

In Kenya, judicial restraint has been the dominant approach in matters where the executive has pleaded national security over fair trial rights. The judiciary's' reluctance to prioritise human rights over national security is attributable to the prevailing common law tradition. The common law and its doctrinal traditions, philosophic underpinnings, and styles of reasoning and interpretation, retain substantial prestige and influence among lawyers and judges, and has often provided the default rules and norms for framing and analysing issues in applications for judicial review.

On the face of it, the Kenyan judiciary's fidelity to common law doctrine and methods of interpretation might appear to pose no difficulty for the judiciary where it has to balance national security and human rights. After all, such important safeguards of liberty as the writ of habeas corpus and contemporary notions of "due process" had their ancestry in the common law.[138]

Yet, the common law, in its method, substance, and philosophical underpinnings, carries with it elements and tendencies that do not accord with the transformative vision reflected in the Constitution of Kenya 2010. These

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[137] Ely, Democracy and Distrust: A Theory of Judicial Review, 13-14; Cole, "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crises," 2566-2567.

[138] See Forsythe C D, The Historical Origins of Broad Federal Habeas Review Reconsidered, 70 NOTRE DAME L. REV. 1079, 1080 (1995) ("The writ [of habeas corpus] is deeply based in the English common law, dating back to at least the thirteenth century.").

tendencies and elements stem from the basic constitutional and jurisprudential paradigm upon which English common law is built, namely Austinian positivism and Diceyian parliamentary sovereignty.[139]

McWhinney observes that these ideas are problematic for judicial review and constitutional supremacy.[140] In the specific context of the Constitution of Kenya 2010, judicial fidelity to the common law method and style of interpretation, particularly the common law presumption of constitutionality in the interpretation of statutes and the treatment of constitutional limitation clauses as "clawback" clauses, present significant difficulties for rights.

Attiyah argues that the common law jurist approaches the interpretation of legal texts in a mechanical and literal fashion,[141] prioritising strict enforcement of the expressed will of a sovereign legislature. A consequence of this approach, according to Paul is that judges steeped in the common law tradition, [as Kenyan judges and lawyers are] frequently treat problems of textual interpretation as "semantic matters . . . rather than as issues which call for identification and analysis of inevitably competing interests."[142] Far more attention is given to the

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[139] See Jenkins D, From Unwritten to Written: Transformation in the British Common-Law Constitution, 36 VANDERBILT JOURNAL OF TRANSNATIONAL LAW. 863, 867-905 (2003).
[140] See, e.g., Mcwhinney E, Judicial Review 213 (4th ed. 1969) ("The more positivist-minded judges may feel that it is their duty to interpret a constitutional Bill of Rights harshly, insofar as the Bill constitutes an interference with and abridgement of governmental legislative powers; that strict and literal interpretation should be the key-note in judicial review, and that care should be taken not to expand the Bill's operation beyond its express terms.").
[141] See, e.g., Atiyah P.S, Law and Modern Society ( Oxford University Press 2d ed. 1995)164 (referring to the "narrow and literal methods of interpretation commonly used by English judges in interpreting ordinary Acts of Parliament").
[142] Paul J C N, Some Observations on Constitutionalism, Judicial Review and Rule of Law in Africa, 35 OHIO ST. L.J. 851, 853 (1974) ("In Africa, the question of whether governments are

dictionary meaning of words and to canons of interpretation than to underlying policy concerns or the implications for constitutionalism of a particular interpretive choice.[143]

Although the common law evolved largely in the context of private law litigation and statutory interpretation within a system of parliamentary sovereignty, the Kenyan judiciary through *El Mann* extended this same approach to the interpretation of constitutional text. In fact, it is not uncommon for Judges to rely on pre-existing interpretation Acts[144] to interpret disputed constitutional text.[145] Such an approach to constitutional interpretation tends to resolve textual ambiguity in favour of conventional understandings.[146]

Fidelity to the common law also creates further difficulty for the development of constitutional rights because of the common law doctrine according presumptive validity or constitutionality to legislative acts. This presumption means that, a

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to be accountable to legal standards . . . has been identified by many outstanding jurists and political leaders as one of the most important problems of political development.") at 860.

[143] See id.; see also Lord Irvine, Lord Chancellor, The Common Law Origins of English and American Law, Address at the Inner Temple Lecture 81 (Mar. 22, 2000) (describing the "narrow function" of the common law to resolve dispute between the disputants as focusing "attention on the immediate interests of the parties, and away from broad theoretical constructs or considerations of public policy").

[144] The Interpretation and General Provisions Act cap 2 is an omnibus legislation that sets forth the authoritative definitions, canons, and other guideposts that judges must employ in the construction of statutes and other legal texts. In a system of constitutional supremacy, the Interpretation Act cannot, of course, be deemed controlling in matters of constitutional interpretation.

[145] See El Mann supra.

[146] See, e.g., *Asare v. Attorney General*, Writ No. 3/2002 (decided, Jan. 28, 2004, Sup. Ct., Ghana) (unreported) (holding, partly in reliance on long-established practice, that a provision of the national constitution designating the Speaker of Parliament to act as President whenever both the President and Vice President are "unable to perform" the duties of their offices may be read to allow the Speaker to be sworn in as Acting President when the President and Vice President are, by virtue of foreign travel, both temporarily way from the country).

court presented with a challenge to the constitutionality of a statute (or, in some cases, even a piece of subsidiary legislation) must proceed on the assumption that the law in question is constitutional, thus placing the burden of proving the contrary on the challenger.[147] In effect, the common law has a built-in bias in favour of power (the state), rather than liberty (the individual). This position is defended on the ground that legislation, being the deliberative output of the people's representatives, possesses superior democratic legitimacy and is thus entitled to special priority in a democracy.[148] Tumwine-Mukubwa has observed that in the common law world, this rationale is tied to the notion of parliamentary supremacy.[149] Aharon Barak has argued that in post-authoritarian societies, pre-existing laws enacted by colonial or one-party parliaments should similarly be denied the benefit of the common law presumption.[150]

The development in contemporary Kenya of a jurisprudence that advances human rights has also had to contend with the problem of cultural relativism. In this regard Sakah S. Mahmud has observed that the liberal conception of the individual as a bearer of rights enforceable against the collective that is the state, has always met with resistance from an influential segment of Africa's

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[147] idem

[148] Nwabueze B O, Judicialism In Commonwealth Africa: The Role Of Courts In Government (1977) (discussing the judicial role in the constitutional governments of commonwealth Africa); at 225.

[149] Tumwine-Mukubwa G P, Ruled from the Grave: Challenging Antiquated Constitutional Doctrines and Values in Commonwealth Africa, in Constitutionalism in Africa: Yesterday, Today and Tomorrow Oloka-Onyango, J. (Makerere University 2001) 292.

[150] See Barak, A, Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 (Harvard Law Review 2002) 19, 25 ("A judge should not advance the intent of an undemocratic legislator. He must avoid giving expression to undemocratic fundamental values.").

intellectual and governing class, including sections of the legal and judicial elite.[151] This school of thought posits, in counter-opposition to the liberal notion of individual rights, an "African" concept of human rights.[152]

This concept was deployed in the early post independence decades by the continent's ruling elites to reject demands for democracy and civil and political liberties.[153] Nonetheless, the cultural relativist challenge to the universality of human rights retains influential, if diminishing, support amongst elements of Africa's tradition-bound elites, including, significantly, the judicial elite.

## 5. Research Objectives

The primary objective of this research is to examine the scope and legitimacy of the exercise of judicial review under Article 165(3), to ascertain whether the judiciary can and if so to what extent the judiciary should exercise oversight to curtail abuse of executive power in national security matters and to propose a model that may be adopted in judicial review.

The secondary objectives are:

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[151] See Mahmud, S S The State and Human Rights in Africa in the 1990s: Perspectives and Prospects, 15 (Human Rights Quarterly 1993) 485, 492-95.

[152] The central claim of this relativist school is that "African culture" is communalistic or group-centered rather than individualistic; therefore, a concept of rights that has the individual as its primary focus is alien to and subversive of the cultural integrity of African society. Specifically, this "African perspective" on rights rejects the standard set of so-called "Western" civil and political rights, among them freedom of speech and expression, as luxuries that an impoverished people do not need and can ill afford. Instead, Africans are said to be interested primarily in the "right to development," the realization of which demands a shift of focus from "civil and political" rights to "social and economic" rights.

[153] See Mahmud, supra note 204, at 494 ("African rulers use [African communal] values . . . as a way to consolidate their rule and to accumulate capital.").

First to examine the exercise of executive power focusing specifically on how the judiciary has balanced executive power and human rights in national security matters.

Second, to examine whether judicial review is a democratically legitimate practice and the extent to which exercise of executive power in matters of national security should be subject to judicial review.

Third, to review how judges approach cases that bear on the constitutionality of the exercise of executive power in matters of national security

Fourth, to examine the limits and remedies available to check judicial review of the exercise of executive power in matters of national security and to determine its effectiveness and offer suggestions.

By meeting these objectives it is aimed to determine the proper role of judicial review under Article 165(3), identify gaps, explicit and implicit constitutional limits and suggest a model for the exercise of judicial review of executive power in national security matters.

## 6. Hypothesis

Lack of a constitutional, statutory or judicial model for judicial review in national security matters grossly undermines its effectiveness as a tool for checking executive power under Article 165(3) of the Constitution of Kenya.

## 7. Research Questions

This dissertation sets out to answer the following three questions:

i. What is the definition, origin, types and scope of judicial review?

ii. What is the nature and scope of executive power in matters of national security?

iii. How has the judiciary balanced the exercise of executive power, human rights and legitimacy concerns?

iv. Does the Judiciary have the democratic legitimacy to review national security matters?

v. What are the appropriate models for judicial review of national security matters?

**8. Justification of the study**

An examination of judicial review as a check on executive power in matters of national security is a justifiable research question for a number of reasons.

First, the importance of maintaining our democratic tradition and consolidating the gains in the 2010 Constitution is a vital issue in Kenya. Second, the effectiveness of constitutional checks and balances is important for social, political and economic stability because they are often an arena of intense tension between the three arms of government. Third, the scope of judicial review of executive conduct is difficult to ascertain because of the maze of statutory and constitutional complexity. Fourth, examination of the scope of judicial review of executive conduct in the area of national security is rarely attempted. A fifth reason is that examining the scope of judicial review and evaluating its

effectiveness as a check on executive conduct in the area of national security is an integral part of wider judicial policy that recognises a problem and states in general what is to be done about it. Finally, with personal rights at stake in many judicial review applications, it is essential to clarify the appropriate scope of review for both lawyers and courts engaged in judicial review of those decisions. Resolution of this issue would promote both an appropriate balance between executive power and individual rights, and consistency of judicial review decisions.

This thesis anticipates contributing to an understanding of the nature and scope of judicial review and executive power with an analytical perspective of the concepts. An analytical examination of the nature and scope will reinforce post 2010 jurisprudence on judicial review of executive conduct.

## 9. Approach and Methodology

### 9.1 Research philosophy.

In Oxford Advanced Learner's Dictionary[154] "research" means a careful study of a subject, especially in order to discover new facts or information about it. The term is commonly confined to the natural sciences and laboratory studies, but in this work it is used to mean a careful and systematic process of inquiry to find answers to a problem of interest. It is anticipated here to do "research", to investigate a problem systematically, carefully and thoroughly.[155]

[154] Hornby, A.S. (ed.). (2010). Oxford advanced learner's dictionary (8th ed.). Oxford: Oxford University Press.
[155] Tan W, Practical Research Methods (2nd ed, Prentice Hall, Singapore, 2004), p 3.

A "scientific attitude" is adopted in that the research is carried out systematically, sceptically and ethically for the purpose of seeking the "truth" about the subject of the research.[156] The research philosophy adopted in this thesis is consistent with a "real world enquiry" advocated by Colin Robson.[157] It involves applied research because the interest here is on solving problems rather than just gaining knowledge.

### 9.2 Research design

The research design may be defined as the plan for getting from the research question to the conclusion.[158] This part lays out the conceptual structure within which this thesis is to be conducted.

The primary *objective* of the research undertaken in this thesis is to examine whether the institution of judicial review of executive conduct on matters of national security is desirable for a representative democracy like Kenya. The secondary objectives are complimentary to this objective.

The broad *theoretical frameworks* of separation of powers doctrine is the area within which the research is undertaken based on policy analysis and evaluation theory.[159] Other theories and assumptions underpinning the thesis have been introduced earlier in this chapter. Collectively, these theories provide a

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[156] Robson C, Real World Research: A Resource for Social Scientists and Practitioner - Researchers (2nd ed, Blackwell Publishers, Oxford, 2002), p 18.
[157] Robson above p.27.
[158] Tan Note 208 above at p 76.
[159] These broad theoretical fields will be discussed in Chapter 2

conceptual framework to link the phenomena being studied and allow the findings to be understood in a wider context of human knowledge.

The *methods* used to collect data to answer the research questions are a conceptual framework, literature review and case studies.[160] The conceptual framework will include theories about judicial review which are accepted universally. Literature review will include books written on judicial review both generic and specific and research done on the field as well as challenges being faced and ongoing work. The case studies provide factual information and examples to allow the research questions to be answered in the real world. The purpose of case studies is, "to tell a big story through the lens of a small case."[161] Case studies are frequently used in research of policy and regulatory design.

This work emphasizes the importance of separation of powers theory and the way it shapes debates over judicial review of executive power. It is intended to outline a robust structural approach[162] to judicial review of executive conduct, the numerous interpretive and non-interpretive variables of judicial power such as structure of the constitution. In particular, this work will contrast judicial

[160] A literature review is made of the theory and practice of evaluating the effectiveness of legal systems using standard research techniques such as searches of library catalogues and online databases of journals. A literature survey, or content analysis, is conducted to quantify the percentage of published work that evaluates different judicial review regimes. A case study is made of describing a judicial review regime and the subject of this case study is judicial review in select common law jurisdictions.
[161] Tan note 219 above at p 77.
[162] Oxford Advanced Learner's Dictionary. (in literature, language and social science)a theory that considers any text as a structure whose various texts only have meaning when they are considered in relation to each other.

deference and judicial activism visions and subject them to interpretative analysis.

The methodology adopted in this thesis is a flexible qualitative design strategy using literature review of documents for evaluating the effectiveness of judicial review regime as a check on executive excesses. *Arild Underdal* explains the methodology required to assess the effectiveness of a legal regime:[163]

> From a methodological perspective, evaluating the effectiveness of a cooperative arrangement means *comparing* something – let us provisionally refer to this object simply as *the regime* – against some standard of success or accomplishment. Any attempt at designing a conceptual framework for the study of regime effectiveness must, then, cope with at least three (sets of) questions: (1) what precisely constitutes the *object* to be evaluated? (2) against which *standard* is this object to be evaluated? and (3) *how* do we go about comparing the object to this standard – in other words, what kind of measurement operations do we have to perform to attribute a certain score of effectiveness to a certain regime?

For this thesis, the *object* to be evaluated is the judicial review regime where executive competence is pleaded, and the outcomes achieved by it. The *standard* against which this object is to be evaluated is the objective of constitutionality. The *how* will be a comparative analysis of judicial review in five jurisdictions to compare the outcomes achieved.

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[163] Underdal A, "One question, two answers" in Miles E, Underdal A, Andresen S, Wetterstad J, Skjærseth JB, and Carlin EM, Environmental Regime Effectiveness: Confronting Theory with Evidence (The MIT Press, Cambridge Ma, 2002), pp 4-5. This work built upon Underdal A, "The concept of regime 'effectiveness'" (1992) 27(3) Cooperation and Conflict 227 at 228-229. See also Helm C and Sprinz D, "Measuring the effectiveness of international environmental regimes" (2000) 44(5) Journal of Conflict Resolution 630.

Three methods are used to collect data to answer the research questions in this thesis: a literature review and case studies. Each of these is guided by a sampling strategy linked to the research question.

The research for this thesis was carried out mainly through desktop research by making use of the materials at various libraries and academic databases. The advantages of this approach were that it enabled me to gain at a relatively low cost the initial insight into the subject matter of the thesis, to discover the methodologies adopted by other researchers, and the state of the subject matter in the past. Online research made it easier to access various types of data so that I did not need to burn the midnight oil over archives or traditional sources as they were largely available in a digital form. Most of the data was already documented in texts or in the internet which I accessed without much effort and proceeded to analyse. This saved me a lot of time. Finally, the data I accessed and analysed was vast, varied and showed the perspective of many authorities on many issues with different variables. By further analysis of these issues I was able to develop the model that is suggested in Chapter Six.

Desktop research came with certain disadvantages. Since desktop research was derived from the conclusion of the primary research, no matter how rigorous the analysis, its quality and validity depended on the reliability of the primary data. Most of the secondary data I managed to access did not show exactly how or what I was looking for in my research questions because it was merely collection of lots of data from lots of perspectives and people. I was looking for data with

specific research questions in mind but much of what I collected did not answer my research questions nor was I able to control the contents of the specific sources. The challenge of outdated information was ever present because I had to constantly note the date when the information was collected. Whereas I had to constantly all data, it was not possible to get all the updated reports or statistics of the data.

In essence, this project was aimed at researching a wide breadth of documents and materials. To examine and prove the hypothesis, particular attention was directed towards examining the theories that govern judicial review of executive conduct generally, the law, the nature and protection accorded by judicial review and more importantly post 2010 landmark cases in judicial review applications in Kenya. This era was used because it has been marked by the most visible tensions and will as well enable the examination of the scope of emerging judicial review paradigms.

In furtherance of the hypothesis I used arguments put forward by experts, legal professionals, writers and jurists against and in support of judicial review as a tool for curbing executive arbitrariness. Using these arguments with judicial review cases in Kenya helped in establishing the scope and effectiveness of judicial review as a check on executive arbitrariness.

The work adopted an unfolding qualitative research methodology. The design developed as more was learnt. Along the way, the work may have been redesigned to meet changing conditions and dynamics.

### 9.3. Sampling

The work examined relevant case law, journal articles and learned treatises, the Constitution of Kenya and the Constitution of the United States of America because of their pronounced recognition of the institution of judicial review and separation of powers, India for taking the middle-ground position and the United Kingdom on account of the absence of judicial review and as a source of common law. A review of these made it possible to capture a spectrum of viewpoints and analyse such data to be able to draw conclusions to prove or disprove any of the hypotheses.

In sampling as in methodology generally, the work examined and analysed case law, constitutions and works by authoritative authors on the subject. The extent of success in this regard was borne by the writer's training and experience. More significant is that writer was flexible and open to adjustments on good advice and to reported without bias on the strengths and weaknesses of the project. The work is specific rather than general in its findings and to allow others to check the extent of acceptability of conclusions from the data.

### 9.4. Data generation and collection methods

Data generation and collection methods was largely restricted to a legal historical [to review the development of legal rules and to propose solutions to existing law based on historical facts] and legal comparative [to compare different jurisdictions] approaches.

The legal comparative approach was used while comparing and examining what happens in Kenya in respect of any aspect of the study vis-à-vis other jurisdictions listed. Document analysis presented the opportunity to collate, process, present and analyse data from courts and authors. This covered a wide range of jurisdictions. That way, the text identified gaps in the existing literature on the subject of the work which in the end enabled the work to reach logical conclusions and offer prescriptions.

Additionally, the adoption of a comparative approach created an insight into how courts in various jurisdictions handle judicial review in matters of national security. Their experience becomes relevant in examining the Kenyan situation and in identifying its weaknesses.

The study carries out a comparative analysis and evaluation of Kenya, United States, Indian and United Kingdom cases. An investigation into how courts in the United States and United Kingdom have dealt with various aspects of the study is undoubtedly useful and serve as persuasive authority. The objective of the comparative analysis was to discover the best approach adopted by courts in various jurisdictions to define the scope and legitimacy of judicial review.

**10. Chapter Outline.**

The thesis is structured in six chapters.

**Chapter One: Introduction and Statement of the Problem.**

Chapter One is the introductory chapter and is dedicated to a brief discussion of the historical background of the concept of judicial review and how it is a product of constitutional supremacy and separation of powers. Judicial review as conceived in Article 165(3) of the Constitution of Kenya 2010 is identified as novel construct without home grown precedent in judicial practice. The chapter then introduces a brief discussion of the challenge of balancing claims of national security and civil liberties without such precedent, the arguments that have been raised generally against and in support of the concept and identifies the research problem as one of a missing judicial, constitutional and statutory model for the national security privilege. In this chapter are the research questions and objectives aims, literature review and document analysis and justifications of the study. It also discusses the methodology employed and structure of the study.

**Chapter Two. Ascertaining the scope of judicial review.**

The problem identified in Chapter One is that Article 165(3) judicial review is a novel construct and there is no judicial, constitutional or statutory model for its operationalisation. Chapter Two is therefore dedicated to constructing, clarifying and distinguishing various types of judicial review by examining origins, definitional problems; and analysing foundational concepts such as separation of powers, rule of law and national security. These are key concepts that are central to an understanding of the judicial role in reviewing executive competence in national security decisions. Explanations of concepts such as

jurisdiction, justiciability and judicial interpretation are made so as to locate them within their proper context in judicial review of national security decisions. Also analysed will be the source of authority for judicial review as well as significance and scope of judicial review. This chapter provides a substantive theoretical framework for a more pointed analysis of the nature and scope of executive authority in Chapter Three.

**Chapter Three: Limits and remedies: How the judiciary has balanced human rights and national security concerns.**

The Security Laws (Amendment) Act No 19 of 2014 provided a powerful tool to the state in its obligation to combat terrorism and to protect the well-being of its citizens and their property. Although various safeguards were included in the Act, some of these measures surpassed certain rights protected under the Constitution and the Bill of Rights in particular. This chapter discusses how the court handled conflicts of interest between the Act and the Constitution by analytically addressing the following questions:

i. How the judiciary balanced national security and human rights while striking out sections of the Security Laws (Amendment) Act No. 19 of 2014,

ii. What informed the judiciary in doing what it did?

iii. Was the judiciary justified in taking the position that it did?

iv. Does the judiciary have the democratic legitimacy to take the position that it did?

v. Are human rights more important than national security or vice versa?

vi. Are there any problems that are likely to arise as a result of this stance taken by the judiciary?

vii. What are the experiences elsewhere? This part conducts an analysis or public interest claims in Kenya, India, the United States and the United Kingdom in order to determine whether civil liberties, executive transparency and accountability are better served by one particular model rather than another.

**Chapter Four: Judicial review: A desirable and effective way to check and balance executive conduct in matters of national security.**

Judicial review has been characterised by popular constitutionalists as being illegitimate in a democracy or inconsistent with the separation of powers doctrine and that the Constitution should be enforced through popular, majoritarian means, such as elections and legislation. It is argued in this Chapter that because the constitution has introduced a new order in which any limitation of constitutional rights must be objectively justifiable, there is now a general outline on how to measure and control the exercise of executive power in matters of national security. This outline of measurement and control is discussed. The chapter in its final part also considers the question whether, besides legitimacy, concerns judicial review is a justifiable, necessary and effective way to measure and control the exercise of executive power in matters of national security.

**Chapter Five: How some laws that encroach rights might be justified.**

This chapter identifies and critically examines select laws that are frequently applied by the Executive in matters of national security which encroach upon constitutionally enshrined rights and freedoms and discusses how such laws might be justified. In this chapter is identified the right or liberty, whether they require particular scrutiny and justification and if so how the judiciary might do this.

**Chapter Six: Conclusion and Recommendations**

Chapter Seven is the conclusion and will comprise a synthesis and overview of some key findings made in preceding chapters as well as recommendations to developing a constitutional and legal framework for judicial review of executive power in matters of national security.

## CHAPTER TWO

## ASCERTAINING THE SCOPE OF JUDICIAL REVIEW

### 2.1. Introduction

The problem identified in Chapter One is that Article 165(3) judicial review is a novel construct and there is no constitutional, statutory or judicial model for its operationalisation which undermines its effectiveness as a tool for checking executive power. Because there is need for a predictable pattern whenever courts review matters of national security, an in depth understanding of the concept of judicial review is imperative to inform any considerations on reform. This chapter lays out the conceptual framework for an in-depth understanding of judicial review. This entails a pointed analysis by constructing, clarifying and distinguishing various types of judicial review; examining origins, definitional problems; and analysing foundational concepts such as separation of powers, rule of law, national security, jurisdiction, justiciability and judicial interpretation so as to locate them within their proper context in judicial review of national security decisions. Also analysed are the sources of authority for judicial review as well as significance and scope of judicial review.

As will be evident in this chapter, this thesis is concerned with the observance of significant constitutional doctrines such as Rule of Law and Separation of Powers. The courts reinforce Rule of Law by institutions of state whenever they make binding decisions. In the judicial review process the dynamics that exhibit the various roles allocated by the constitution to the Executive, Legislature and

Judiciary play out and courts are bound by the constitution to look out so as not to infringe Separation of Powers. This is the relationship between Judicial review and the doctrines that are discussed below. Besides, these doctrines are key concepts that are central to an understanding of the judicial role in reviewing executive competence in national security decisions and could inform changes to particular executive powers and constitutional oversight mechanisms.

Criticisms directed at judicial review of executive conduct as noted in Chapter One relate largely to issues of democratic legitimacy. These criticisms stem from pre-existing doctrines of constitutional law. In order to suggest meaningful recommendations for reform, it is first necessary to analyse these constitutional doctrines with a view to identifying how executive responses may be improved.

The starting point for a substantive theoretical framework for judicial review is the Constitution of Kenya 2010 that establishes the foundation upon which the structure of government is built. Because the Constitution outlines the framework and procedures of the government and sets limits on governmental power, a review of the provisions of its foundational articles helpfully links up and clarifies core constitutional concepts on which judicial review is based.

### 2.2. Judicial Review in the Constitution.

The principle of popular sovereignty in Article 1(1) establishes that all power rests with the people, and that the people have donated to the government its power through the Constitution. The government can only function with the consent of the people. It also establishes the principle of limited government

which is that government can do only those things that the people have given it authority to do in the Constitution. In other words, it must obey the law.[1]

The Constitution under Article 1(3) divides the government into three branches: legislative, executive, and judicial. Generally speaking, the legislative branch, makes the nation's laws. The executive branch enforces the laws through the president and various executive offices. The judicial branch, arbitrates disputes that arise under the laws. This division of government is called the separation of powers and is supposed to prevent tyranny, arbitrariness or unfair government action that can result when one person or institution has absolute power to make, enforce, and interpret the laws.[2]

The three branches of government are connected by a system of checks and balances, which allows one branch to restrain the power of another. For example, while Parliament makes the laws, the president has the power to veto them.[3] Parliament also has the ability to override a presidential veto by a two-thirds vote

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[1] Article 2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
(2) No person may claim or exercise State authority except as authorised under this Constitution.

[2] (3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—
(a) Parliament and the legislative assemblies in the county governments;
(b) the national executive and the executive structures in the county governments; and
(c) the Judiciary and independent tribunals.

[3] 115. (1) Within fourteen days after receipt of a Bill, the President shall—
(a) …
(b) refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.

in each chamber.[4] Because Parliament holds the purse strings, it can derail the president's plan by refusing to provide funding.

The Constitution intends each branch's power to be separate, but not absolute which is considered to be dangerous. To prevent the power of any one branch from being absolute, the Constitution contains a system of checks and balances. These are powers that each branch has for limiting the power of the other branches.

The judiciary's main powers over the executive are judicial review and judicial interpretation found in Article 165(3). Judicial review as understood here is the merits review power to review executive action to determine if it violates the Constitution. Judicial interpretation is the power to determine the validity and meaning of executive agency regulations. Other judicial checks include the statutory writ of *habeas corpus*, the writs of mandamus, certiorari and prohibition.

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[4] 115... (2) If the President refers a Bill back for reconsideration, Parliament may, following the appropriate procedures under this Part—
(a) amend the Bill in light of the President's reservations; or
(b) pass the Bill a second time without amendment.
(4) Parliament, after considering the President's reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President's reservations, by a vote supported—
(a) by two-thirds of members of the National Assembly; and
(b) two-thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate.
(5) If Parliament has passed a Bill under clause (4)—
(a) the appropriate Speaker shall within seven days re-submit it to the President; and
(b) the President shall within seven days assent to the Bill.
(6) If the President does not assent to a Bill or refer it back within the period prescribed in clause (1), or assent to it under (5) (b), the Bill shall be taken to have been assented to on the expiry of that period.

The executive branch's main powers over the judiciary are the appointment power under Article 166(1), executive privilege exempting disclosure of information when such would result in adverse effects, and the power of mercy under Article 133.[5]

Judicial review is one element of the system of checks and balances. It is so significant that it is considered a basic principle of the constitutional system in its own right. When a court declares an action unconstitutional, it becomes illegal the moment the ruling is issued. It is the High Court that possesses the power of judicial review.[6] The Constitution specifically allows for judicial review under Article 165(3). What follows is a brief discussion of constitutional concepts foundational to judicial review such as rule of law and separation of powers.

### 2.3. Rule of Law

Executive conduct in matters bearing on national security must be within the confines of law, in other words observe Rule of Law. To be able to construct an appropriate model for judicial review of national security matters, utmost regard must be given to observance of Rule of Law otherwise there is real risk of failure.

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[5] The power of mercy acts as a check on the Judiciary because it allows the Executive to override a judicial decision.

[6] 165. (1) There is established the High Court, which—(3) Subject to clause (5), the High Court shall have—
(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
(i) the question whether any law is inconsistent with or in contravention of this Constitution;
(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;

There is no consensus on the meaning of the term "the Rule of Law."[7] There is, for example, disagreement about whether the term relates to outcomes or to process[8] and whether the Rule of Law is based mainly on natural law or positive law principles.[9] There is also disagreement (about the detailed meaning of the term) between the Common Law World (CLW) – of which Kenya is part – and parts of the world which have a different political-legal tradition such as the mainland of the People's Republic of China (PRC).[10] It suffices to state that there is no universal agreement about what it means: "the rule of law has meant many things to many people;"[11] nor is there agreement about how it can be "reconciled with other, competing, values, notably with the requirements of democratic government."[12]

Notwithstanding these differences of opinion, there is quite wide agreement within the Common Law World – and often beyond – on the basic requirements for any political-legal system to make a credible claim that the Rule of Law

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[7] See, for example, Kleinfeld-Belton, Rachel, Competing Definitions of the Rule of Law, Carnegie Papers at: http://www.carnegieendowment.org/files/CP55.Belton.FINAL.pdf. See, also: Li, Bo, What is Rule of Law? At http://www.oycf.org/ [accessed on 20th November 2015] Perspectives/5_043000/what_is_rule_of_law.htm; Peerenboom, Randall, A Government of Laws, Democracy, Rule of Law and Administrative Law reform in the PRC (2003) 12 Journal of Contemporary China, 45 (Peerenboom-A); and Peerenboom, Randall, China's Long March Toward Rule of Law (Cambridge University Press, Cambridge, 2002) (Peerenboom-B).

[8] Kleinfeld-Belton, idem. Note 7

[9] Peerenboom-B, idem. note 7, 127.

[10] Peerenboom-A, idem note 7, 50-54.

[11] Jeffery Jowell, The Rule of Law and Its Underlying Values, in THE CHANGING CONSTITUTION (J. Jowell & D. Oliver eds., Oxford Univ. Press 7th ed. 2011). See also Jeffery Jowell, The Rule of Law Today, in THE CHANGING CONSTITUTION 57 (J. Jowell & D. Oliver eds., Oxford Univ. Press 6th ed. 2007).

[12] Francis G. Jacobs, The Sovereignty of Law: The European Way 7 (2007).

operates within that system.[13] Revisiting its ancient origins is useful to clarify some of the meanings attributed to the concept.

### 2.3.1. Ancient Greece: Aristotle and Plato

The Rule of Law, as a concept, has deep roots in European political thought. It first emerged as a rule of restraint in the exercise of political power espoused by ancient Greek philosophers concerned about the potential for a democratic government to degenerate into a tyranny.[14] The idea was already practised in Athens in the fifth Century B.C. where the Magistrates of the Polis, the democratic political community, could be charged with violations of the law by private citizens.[15] Thus, Plato intended that the legal code incorporated in his work *The Laws*, would be permanent in nature and insisted that the government should be bound by these laws because:

> [W]here the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.[16]

Aristotle went further in stating:

> Now, absolute monarchy, or the arbitrary rule of a sovereign over all citizens, in a city which consists of equals, is thought by some to be quite contrary to nature;

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[13] ibid at 51.
[14] Pietro Costa, The Rule of Law: A Historical Introduction, in THE RULE OF LAW: HISTORY, THEORY, AND CRITICISM 73, 75 (Pietro Costa & Danilo Zolo eds., 2007).
[15] Rian.B Z. Tamanaha, On The Rule Of Law: History, Politics, Theory 7 (Cambridge Univ. Press 2004).
[16] Plato, The Laws 174 (Trevor J. Saunders trans., London, Penguin 1970) (355–347 B.C.).

> . . .That is why it is thought to be just that among equals everyone be ruled as well as rule, and therefore that all should have their turn. And the rule of law, it is argued, is preferable to that of any individual; On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law. . . . Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.[17]

This brings to the fore most of the fundamental questions that have defined discourses on the idea of the rule of law, i.e. the question of self-rule in situations of political equality, of subjection of government officials to the law, and of identification of the law with reason which would protect the law from abuse by those who hold power. In particular, the contrast that Aristotle established between the rule of law as reason, and the rule of man as passion, became one of the recurrent questions throughout the European history of the philosophy of law.[18]

Both Plato and Aristotle considered the aim of law to be maximization of the common good of the community and the improvement of moral development. Thus, according to Plato, law is a reflection of a divine order consistent with "The Good:" "the laws that are not established for the good of the whole state are

[17] Aristotle, Politics bk. iii, at 78 (Steven Everson ed., Cambridge Univ. Press 1988).
[18] See Tamanaha, supra note 15, at 9.

bogus law"[19] while Aristotle adds that "what is just will be both what is lawful and what is fair, and what is unjust will be both what is lawless and what is unfair."[20] Aristotle concluded that "true forms of government will of necessity have just laws, and perverted forms of government will have unjust laws,"[21] and he added further that "laws, when good should be supreme."[22] However, neither Plato nor Aristotle advocated rebellion against the law, even against unjust laws, and neither of them approved of popular democracy, which was viewed as the potential rule of the uneducated and unintelligent mob susceptible to being seduced by demagogues. Also, neither were egalitarian since they both believed people had unequal talents in political capacity, virtues, and intelligence. According to Plato and Aristotle, the best government consisted of rule by the best man, not rule by law, for the law cannot foresee all eventualities. Therefore, Plato considered that "where the good king rules, law is an obstacle standing in the way of justice"[23] and Aristotle advocated rule under the law in order to avoid the risk of corruption and abuse that arises when power is concentrated in a single pair of hands.[24]

When criticising popular tyranny in democracies, Aristotle introduced the notion of sovereignty of law:

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[19] See generally PLATO, supra note 15; ARISTOTLE, supra note 16; Fred D. Miller, The Rule of Law in Ancient Greek Thought, in THE RULE OF LAW IN COMPARATIVE PERSPECTIVE 11, 11 (Mortimer, Sellers & Tadeusz eds., 2010) [hereinafter COMPARATIVE PERSPECTIVE].
[20] Aristotle, Nichomachean Ethics 117 (Terence Irwin trans., Hackett Publshing Co. 1985).
[21] Aristotle, supra note 17, at 68.
[22] Ibid.
[23] Plato, quoted in John Walter Jones, The Law and Legal Theory of The Greeks 7 (Oxford, Clarendon Press 1956).
[24] Aristotle, supra note 17, at 76.

> [S]uch a democracy is fairly open to the objection that it is not a constitution at all; for where the laws have no authority, there is no constitution. The law ought to be supreme overall, and the magistracies and government should judge of particulars.[25]

By contrast Athenian Democrats advocated the supremacy of the law created by all citizens in order to avoid the governance of the aristocratic oligarchies.

### 2.3.2. Ancient Rome: Cicero, *Lex Regia* and the *Corpus Iuris Civilis*.

Roman contribution to the concept of rule of law was both positive and negative. On the positive side Cicero continued the work of Plato and Aristotle in his work *The Republic* where he commented that the king who does not abide by the law is a despot, "the foulest and most repellent creature imaginable."[26] Also in his work in his work, *The Law*s, while describing the function of the magistrate, Cicero points out that:

> [The magistrate] is to take charge and to issue directives that are right, beneficial and in accordance with the laws. As magistrates are subject to the laws, the people are subject to the magistrates. In fact it is true to say that a magistrate is a speaking law, and the law a silent magistrate.[27]

According to Cicero, the status of the laws differed depending on their consistency with natural law. He propounded the idea that natural law being the

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[25] Aristotle, Politics bk. iv, at 89 (Steven Everson ed., Cambridge Univ. Press 1988).
[26] Cicero, The Republic bk. ii, at 50, in The Republic and The Laws (Niall Rudd trans., Oxford Univ. Press 1998).
[27] Cicero, The Laws Bk. iii, at 150, in The Republic and the Laws (Niall Rudd trans., Oxford Univ. Press 1998).

rule of reason stood above positive and human law; it was a law that was consistent with justice and hence reigned supreme.[28]

The negative Roman contributions to the rule of law result from the *Lex Regia* and the *Corpus Iuris Civilis*. The *Lex Regia* legitimised the move from the rule of the Roman Republic to the rule of the Roman Emperor Constantine by ordaining that the new power of the Roman Emperor derived from the absolute authority that the Roman people had bestowed on him for the preservation of the state,[29] which was a legal fiction created by early Roman jurists in order to justify the power of the Emperor. This fiction provided authority during the Middle Ages for democratic thinkers elaborating on the idea of original popular sovereignty and for the development of the idea of the absolute authority of the king by the absolutist thinkers.[30]

The *Corpus Iuris Civilis*, which codified the Roman Law instituted by Emperor Justinian in 527 A.D., contains two maxims relevant to the idea of the rule of law: *"Sed quod principi placuit legis habet vigorem,"* "what has pleased the prince has the force of law" and "*Princeps legibus solutus est,"* "the prince is not bound by the law."[31] These expressions illustrate the tension existing in the fact that the sovereign is both the source of law and subject to the law, a tension that the idea of the rule of law has attempted to reconcile within modern legal systems.

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[28] Tamanaha, supra note 14, at 11.
[29] Peter Stein, Roman Law In European History 59 (Cambridge Univ. Press 1999).
[30] Brian Tierney, "The Prince is Not Bound by the Laws." Accursius and the Origins of the Modern State, 5 COMP. STUD. SOC'Y & HIST. 378, 392 (1963).
[31] Digest 1.4.1 and Digest 1.3.1, cited in STEIN, supra note 28, at 59.

The Middle Ages were epitomised by the efforts of nobles to use law to impose restraints on sovereigns which enriched the concept of rule of law. The central question of the time was "whether the prince was bound by the laws or not."[32] According to the traditional, feudal idea expressed by Bracton:

> [T]he King must not be under man but under God and under the Law, because the Law makes the King . . . for there is no Rex where will rules rather then Lex . . . if he brakes the Law his punishment must be left to God . . . for the King cannot be sued or punished.[33]

There is no doubt that the idea of the rule of law was clearly perceived by medieval thinkers and practitioners and that it prevailed in certain periods and in certain countries during the Middle Ages.[34] Although the government was bound by the law, the illegal arbitrary exercise of power was very rarely subject to institutional control because there were rarely any enforcement mechanisms.[35]

### 2.3.3. Hobbes, Locke, Rousseau and Montesquieu.

Five centuries after the Middle Ages, in the seventeenth and eighteenth centuries, Europe experienced popular uprisings that brought to an end

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[32] Van Caenegem R.C, Legal History: A European Perspective 122–23 (1991).
[33] 1 Henrici De Bracton, De Legibus et Consuetudinibus Angliae 38 (Sir Travers Twiss ed., W.S. Hein 1990) (1878) (on laws and customs of England); Frederic William Maitland, The Constitutional History of England_100–01 (Cambridge Univ. Press 1963) (1908).
[34] Van Caenegem, supra note 32, at 146–47 and 14–16 (describing town charters which stipulated that in criminal cases the relevant article must be read out to make sure that the law is duly applied).
[35] Robert S. Summers, A Formal Theory of the Rule of Law, 6 Ratio Juris 127 (1993). See, E.G., S. Rutherford, Lex, Rex, The Law and The Prince (1644) (ed. 2002) where he supports the idea of a limited monarchy.

unquestionable adherence to monarchical rule and gave birth to significant philosophical contributions to the theory of government and the rule of law. This part now looks at the ideas of some of the foremost thinkers of the time.

According to Thomas Hobbes, the sovereign though bound in conscience by natural law, wields absolute untrammelled power and the rule of law and the sovereign will were accordingly synonymous and equivalent. He advanced the proposition that a rule was inherently powerless unless it was applied, interpreted, and enforced by individuals: "there must always be somebody who has the final word."[36]

On the opposing side, other legal philosophers, such as John Locke, Jean Jacques Rousseau, and Count Montesquieu, provided a new legal basis for governmental authority and the rule of law. First, Locke suggested that legitimate governments had to be based on popular consent and that any action by any government that was not supported by popular consent was not valid and was without authority. He also suggested the following concept of the rule of law:

> [A]ll the power the government has, being only for the good of society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may know their duty, and be safe and

[36] Thomas Hobbes, Leviathan 176–79, 250 (J.C.A. Gaskin ed., Oxford Univ. Press 1996) (1651).

secure within the limits of the law; and the rulers too kept within their bounds. . . .[37]

Second, Montesquieu proposed that countries should elaborate constitutions as fundamental charters containing the original will of the people to be governed. He also underlined the importance of the separation and balance of powers between the legislative, the executive, and the judiciary.[38]

Third, there emerged the notion of Human Rights that individuals were entitled to certain rights of which they could not be deprived of either by the actions of government or by the actions of other individuals. This notion of individual rights was brought to fruition in the American Declaration of Independence in 1776 proclaiming that all men were born free and equal and that the right to life, liberty and the pursuit of happiness were among those rights that are inalienable.[39]

This amalgam of concepts underlying the idea of the rule of law, such as the government submitting to the consent of those being governed,[40] the principle of the separation of powers as an instrument of protection against any violation of the principle of popular consent,[41] and the principle of the existence of inherent

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[37] John Locke, Second Treatise of Government 46–51 (C.B. Macpherson ed., Hackett 1980) (1690).
[38] Baron De Montesquieu, The Spirit of Laws Bk. Xi, at 202 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748).
[39] See Unanimous Declaration of the Thirteen United States of America, 1 Stat. 1 (1776). For a study, see D. Armitage, The Declaration of Independence: A Global History (2007).
[40] Article 1. Sovereignty of the people.
[41] Article 1(3). Delegation of Sovereign Power to the Parliament, Executive, Judiciary and independent tribunals.

and inalienable individual rights[42] were incorporated in the Constitution of Kenya 2010.

### 2.3.4. Definitional Dilemma

There are two very different ways of defining the rule of law that are being discussed in parallel conversations.[43]The first is ends based and enumerates the goods that the rule of law brings to society. The second is institution based and describes the institutions a society must have to be considered to possess the rule of law.

In end based definitions the concept is used to imply at least five different goals: making the state abide by law, ensuring equality before the law, supplying law and order, providing efficient and impartial justice, and upholding human rights. These rule-of-law ends are not universal and need clarification. Presently they are contested and historically determined that they cannot simply be stated as given. The ends must be understood as varying greatly by context, culture, and era and thinking about them must not overlook the fact that they are historically and culturally determined concepts. It is not improbable that new ends can be discovered by reinterpretation or reemphasis of old ideas or that since each end

[42] Chapter Four Bill of Rights.

[43] There are, of course, dozens of ways to classify definitions of the rule of law, depending on the purpose the definition is meant to serve, or what divisions it is intended to clarify. Brian Tamanaha divides the concept between pre-liberal and liberal ends (see Tamanaha, "Rule of Law for Everyone?") Others divide it between formalist and substantivist definitions, or proceduralist and substantivist modes. I have chosen the following means of definition because it best illuminates the dilemmas faced by the rule-of-law building project.

goal touches on different cultural and political issues, different elements of society are likely to have "will" for
different sorts of reforms and that those resistant to one reform may be supportive of another.

The institution based definition of rule of law uses institutions not as a means, but as intermediate or measurable ends. Modern rule-of-law practitioners still define the rule of law as a state that contains these three primary institutions:

a. Laws themselves, which are publicly known and relatively settled;
b. A judiciary schooled in legal reasoning, knowledgeable about the law, reasonably efficient, and independent of political manipulation and corruption;
c. A force able to enforce laws, execute judgments, and maintain public peace and safety: usually police, bailiffs, and other law enforcement bodies.

These three primary institutions of modern-day rule-of-law were first enumerated by John Locke, who stated that legitimate governments were:

> bound to govern by establish'd standing Laws, promulgated and known to the People, and not by Extemporary Decrees, by indifferent and upright Judges, who

> are to decide Controversies by those Laws; and to imploy the force of the community at home only in the execution of such Laws.[44]

The first problem that arises when rule of law is defined by institutions is the tendency for recipient states to move directly toward building institutions that look like their counterparts in developed countries and then follow up with the resources, skills, and professional socialization to help each local institution approach Western models.[45] This can lead to a model that is either unnecessary or unsuited to the political and cultural landscape.

The second problem of defining the rule of law by its institutions is that by ignoring pre existing cultural and political models it slants practitioners toward overly technocratic models of reform. The Greeks recognised that the rule of law rested on more than correctly constituted legal institutions, and their enforcement ideas tended to emerge out of religious strictures far more than human institutions.[46] For this reason, Aristotle claimed that "customary laws have more weight… than written laws."[47]

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[44] Locke, Treatise II, 131.

[45] Thomas Carothers coined the term institution modeling to describe this process; see Carothers T, Democracy Assistance: Political vs. Developmental, Journal of Democracy, vol. 20, no 1, January 2009 p 116.

[46] Aristotle, Nicomachean Ethics V. 6, 1134a-b; see also Aristotle, Politics, III, 11, 1282b. Of course, Plato's entire idea of enforcement of social hierarchy through the noble lie is such an example. Brian Tamanaha describes numerous cultural and social strictures that upheld parts of the rule of law during the medieval era, even when rule-of-law institutions did not exist, see Tamanaha, "Rule of Law for Everyone?" 15.

[47] Aristotle, Politics, III, 16 1287b.

The third problem is that institutional attributes type of definition often follows an idealized blueprint that ignores its own difficulties and flaws and the issues of power and politics inherent in all developed rule-of-law systems and which often fails to ask why institutions are so bad—and whose interests are served through weak rule-of-law institutions.

By treating the rule of law as a set of institutions, reformers handicap themselves in bringing about the end goals of the rule of law but the difficulties of turning a definition of the rule of law based on ends into a practical method of achieving rule-of-law are also real.

### 2.4. Separation of Powers

Judicial review of executive conduct in matters of national security is an exercise in separation of powers through checks and balances. Where the executive acts irregularly or in excess of its constitutional mandate, the judiciary can declare such conduct unconstitutional or unlawful. That the legislature passes security laws which the executive executes and which the judiciary can declare unconstitutional or irregular is an illustration of separation of powers.

The doctrine of "separation of powers" has exercised the minds of jurists over the years. The idea of distinction and balance between the powers of various components of the society has existed in western thought from the earliest times. It is to be found in Plato's *The Republic, the Statesman and the Laws* particularly in the balance which the philosopher sought between the powers of the nobility

and those of the people.[48] It is the most ancient and enduring element of constitutionalism. Vile argued that it was the great pillar of western political thought.[49] According to Vile, its first modern design is to be found in John Locke's writings, especially his *Second Treatise of Government.*[50]

### 2.4.1. The Aristotelian Mixed Regime

In Book 4 of his *Politics,* Aristotle identified the three powers of the State as the deliberative, the magisterial and the judicative:

> There are three elements in each constitution in respect of which every serious law giver must look for what is advantageous to it; if these are well arranged, the constitution is bound to be well arranged, and the differences in constitutions are bound to correspond to the differences between each of these three elements. The three are first, the deliberative, which discusses everything of common importance; second, the officials… and third, the judicial element.[51]

While Aristotle identified the need for separate powers, he stopped short of suggesting that they should be exercised by different organs of the State. Nevertheless this configuration of state powers or functions is possibly the seed of the modern doctrine of separation of powers.

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[48] In Vile infra note 49.
[49] Vile, MJC, Constitutionalism and the Separation of Powers, Oxford, Clarendon Press,1967, 2.
[50] ibid at p. 5
[51] Barker, Sir Ernest (1995). The Politics of Aristotle. Oxford: Oxford University Press. See also Jowett, Benjamin (1984). Jonathan Barnes, ed. Politics. The Complete Works of Aristotle 2. Princeton: Princeton University Press.

In the Middle Ages absolute monarchies emerged in Western Europe but even these were mitigated by divine law which was binding upon the conscience of the monarch. Divine law could also operate to remove from subjects the duty of allegiance and justify disobedience or rebellion against royal authority. The common notion that the king was "under God" was no mere hierarchical notion but was also a moral notion with important political implications.

The political institutions of Kenya were inherited from England and it is appropriate to focus on this consideration of the development of separation of powers from Europe generally to England in particular. A further fetter unique to England is the common law. Originating from the customary laws existing at the time of the Norman conquest, it was developed by Norman lawyers and the king's judges, into a body of law independent of legislation and the royal prerogatives.[52] The king was bound to respect the law.

The subsequent growth and authority of the institution of parliament added a further dimension to the separate exercise of the distinct powers of the State which Aristotle had identified. The exercise of judicial power independently of royal power was unattractive to the Stuart kings who asserted an absolute power of appointment and dismissal of judges. This led to their being overthrown in the revolution of 1688 by a new regime determined that such excesses of royal power would not be repeated.[53] The constitutional changes which followed the

[52] "Common Law". Catholic Encyclopedia. New York: Robert Appleton Company. 1913.
[53] Israel, Jonathan. "The Dutch Role in the Glorious Revolution." In The Anglo-Dutch Moment, edited by Jonathan Israel, 103-62. Cambridge: Cambridge University Press, 1991.

revolution of 1688 emphasised the distinction between the legislative and the executive power. The Bill of Rights of 1689 prohibited the suspension of laws by the crown without the consent of Parliament and the levying of taxes except by grant of parliament.[54] The legislative power was thereby placed firmly in the hands of Parliament and distinguished from the crown's exercise of executive power. The emerging regime was thought to have been inherited from what certain ancient Greek and Roman philosophers had called a "Mixed Regime."[55]

The Englishmen conception was that England was a kind of Aristotelian Mixed Regime where the King, the House of Lords, and the House of Commons each represented the three great estates of English society—the One, the Few, and the Many.[56]

A Mixed Regime was one that combined elements of monarchy, aristocracy, and democracy so as to obtain the best features of each of those pure regime types while avoiding the worst.[57]

According to the advocates of a Mixed Regime, government by one person had the advantage of providing for energy in foreign policy, in the waging of war, and in the combating of powerful domestic special interests but it also had the

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[54] Ibid see also Quinn, Stephen. "The Glorious Revolution of 1688". EH.Net Encyclopedia, edited by Robert Whaples. April 17, 2003. URL http://eh.net/encyclopedia/the-glorious-revolution-of-1688/ retrieved on 19th October 2015.

[55] See David J. Bederman, The Classical Foundations of the American Constitution: Prevailing Wisdom 220–21 (2008); Carl J. Richard, The Founders and the Classics: Greece, Rome, and the American Enlightenment 123–57 (1994); Gordon S. Wood, The Creation of the American Republic 1776-1787, at 11 (Univ. of N.C. Press 1998) (1969).

[56] Gwyn W.B., The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution (1965), at 38.

[57] See, Ville M.J.C., Constitutionalism and the Separation of Powers (1967), at 33–52.

disadvantage that it usually degenerated into tyranny.[58] Government by a few people had the advantage that the wise and the virtuous might rule. But it had the disadvantage that it could easily degenerate into a self-interested and corrupt oligarchy.[59] Government by all of the people had the advantage that it promoted liberty and brought popular common sense into public policymaking. But it had the disadvantage that it too could degenerate into mob rule, which is a tyranny of the Many.[60]

The obvious advantage of a Mixed Regime that combined the powers of the One, the Few, and the Many was that the three social classes represented by the monarch, the aristocrats, and the commoners could check and balance one another, thereby increasing the chance that each social class would rule justly.[61]Power was dispersed in a Mixed Regime rather than concentrated in the

[58] See Aristotle, Politics 1286a8–20, 1286a33–35, 1289a38–b5, 1279b4–8; Polybius, The Histories bk. VI, 7.
[59] See Aristotle, supra note 7, 1286b3–19, 1289a38–b5; Polybius, supra note 7, bk. VI, 8.
[60] Aristotle was the first constitutional theorist to argue normatively for the idea of a Mixed Regime. Aristotle categorized constitutional arrangements according to which social class held power. See Aristotle, supra note 7, 1286b3–7, 1295a25–1296b11. See id. 1289a26–b10. Aristotle identified a Mixed Regime where power was shared by the One, the Few, and the Many as being the best regime that would often be realistically obtainable. See id. 1293b21–1294b40.
[61] See Polybius, supra note 7, bk. VI, 10.

hands of one social class. For this reason, Aristotle,[62]Polybius,[63] Cicero,[64] St. Thomas Aquinas,[65] and Machiavelli[66] all praised the idea of a Mixed Regime. And it was the idea of a Mixed Regime with a system of checks and balances that was to become the parent of the idea of the separation of powers. Both systems share

[62] See Aristotle, supra note 10, 1265b33–1266a5, 1293b21–1294b40, 1309b18–1310a1.

[63] Polybius argued that governments follow an inevitable cycle of constitutional decay (anacyclosis). See POLYBIUS, supra note 7, bk. VI, 4, 57.1. According to Polybius, anarchy would drive people to support a king out of necessity. Eventually the King would abuse his power, and a group of elites would usurp the throne in order to establish an aristocracy. Id. bk. VI, 7–8. This aristocracy would eventually give way to the power of the people, who would reject the concentration of wealth in the elite social class; however, the rule of the Many would eventually deteriorate, ushering in a new period of anarchy. Id. bk. VI, 8–9. Polybius supported the Mixed Regime because he believed it would slow this cycle by making it difficult for one class to abuse the power of the government on its own. Id. bk. VI, 10. He argued that the Roman Republic, whose constitution he felt was responsible for its longevity, was one that created a Mixed Regime. See id. bk. VI, 11.

[64] Cicero's support for the Mixed Regime grew out of his admiration for the Roman Republic. See Cicero, De Re Publica, in De Re Publica, De Legibus II, XXIII (Clinton Walker Keyes trans., 1928) (1st century b.c.) [hereinafter CICERO, De Re Publica] See id. II, XXXII; CICERO, De Legibus, in De Re Publica, De Legibus, supra, III, VII [hereinafter CICERO, De Legibus]. The educated members of the Senate, representing the Few, developed and enacted the policies of the Republic, while popular assemblies, representing the Many, checked this power by voting on proposed legislation and electing consuls and other magistrates who might later serve in the Senate. See CICERO, De Re Publica, supra, II, XXXII–XXXIV;

[65] St. Thomas Aquinas modified the earlier version of the Mixed Regime to account for the superior status of the One. St. Thomas argued that a Mixed Regime structure would provide more stability for monarchies by reducing the likelihood that the Few or the Many would revolt. See ST. THOMAS AQUINAS, De Regimine Principum, in THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 181, bk. I, ch. 6 (Dino Bigongiari ed., 1953) [hereinafter AQUINAS, De Regimine Principum]. St. Thomas also reconciled the Mixed Regime with his Christian faith, thus making the doctrine relevant for both politicians and theologians living in Europe. St. Thomas compared Mixed Regimes to the government instituted by Moses, which included the supreme power of Moses, a group of seventy-two elders, and the participation of all men in the selection of the elders. See ST. THOMAS AQUINAS, Summa Theologica, in The Political Ideas of St. Thomas Aquinas 3, supra, I-II Q.105 [hereinafter AQUINAS, Summa Theologica].

[66] In contrast to St. Thomas, Machiavelli argued for a form of the Mixed Regime where the power of the Many was supreme rather than the power of the One. See MACHIAVELLI, Discourses, in II THE HISTORICAL, POLITICAL, AND DIPLOMATIC WRITINGS OF NICCOLO MACHIAVELLI 93, bk. I, ch. VI (Christian E. Detmold trans., Cambridge, Riverside Press 1882) [hereinafter MACHIAVELLI, Discourses]. Machiavelli argued that the people were the class best situated to governing because the wealthier classes could use their riches to quickly implement abusive policies. Id. bk. I, ch. V. Machiavelli brought back Polybius's cycle of constitutional decline, repeating Polybius's argument that the Mixed Regime had slowed the fall of the Roman Empire. Id. bk. I, ch. II. Machiavelli specifically praised the Republic of Venice as constituting an ideal Mixed Regime since it featured a senate, a greater council, and a civil and military leader who was elected for life. See id. bk. I, ch. VI.

the same premise that "[p]ower tends to corrupt and absolute power corrupts absolutely."[67]

Later in the 18th century, the French and American Revolutions being premised on the idea that all men are created equal[68] killed off the Mixed Regime as they did not permit a hereditary monarchy, aristocracy, or any other distinctions of social class.[69]

Beginning in the 1650s, after the English Civil War, and continuing with the writings of John Locke[70] and Montesquieu,[71] an effort was made by political philosophers to come up with a replacement for the Mixed Regime where the Many ruled but where power would not be concentrated in any one institution that could be easily corrupted. What emerged from this effort was the idea that it was desirable to separate functionally the legislative, the executive, and the judicial power.[72] This functional separation of powers would thus replace the Mixed Regime's division of powers among the three social classes.

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[67] Letter from Lord Acton to Mandell Creighton (Apr. 5, 1887), in LORD ACTON, ESSAYS ON FREEDOM AND POWER 329, 335 (Gertrude Himmelfarb ed., 1972).
[68] See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
[69] Vile notes that when colonies began to move towards revolution, "the theory of mixed government as applied in England was first criticized on the grounds that corruption had so warped the Constitution that it no longer represented a truly balanced structure but was a disguised tyranny." VILE, supra note 9, at 125–26. Authors such as Thomas Paine helped transform this criticism into a wholesale rejection of Mixed Regime government due to its emphasis on hereditary social class status. See id. at 136.
[70] See generally JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION (J.W. Gough ed., 1948) (1690) (arguing both that government rests on the consent of the people and for a functional separation of powers).
[71] See generally 1 MONTESQUIEU, THE SPIRIT OF LAWS (Thomas Nugent trans., J.V. Prichard ed., 1914) (1748) (arguing that a functional separation of powers is necessary to avoid tyranny).
[72] Aristotle may have anticipated the separation of powers when he wrote that "[a]ll constitutions have three parts. . . . One of the three deliberates about public affairs; the second

The constitutional arrangements which existed in England in the 18th century, being the separation powers resulting from the post-1688 settlement upon which responsible government was engrafted,[73] flowed into the constitutions of the former British colonies. Kenya's 1963 independence constitution was based on the standard "Lancaster House template" used for the former British colonies in Africa. By the time the Constitution of Kenya 2010 was framed, however, other influences were also at work so that in it the power of all the institutions of government comes from officials who are picked, either directly or indirectly, by all of the people.[74] In Kenya, the Many rule because the Many get to pick the One and the Few in our democratized version of the English Mixed Regime.

### 2.4.2. Baron de Montesquieu

Many scholars agree that Baron de Montesquieu was the first one to give separation of powers paramount political importance and remains the "oracle who is always consulted and cited on this subject" since his contribution surpassed that of all earlier writers.[75]

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concerns the offices ; . . . and the third is what decides lawsuits." ARISTOTLE, supra note 10 , 1297b36–1298a5.

[73] The classic treatments here are M.J.C. Vile, Constitutionalism and the Separation of Powers (1967) and W.B. Gwyn, The Meaning of the Separation of Powers: An Analysis of the Doctrine from its origin to the adoption of the United States Constitution (1965).

[74] Article 1. (1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.
(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.

[75] See Vile op cit 96-97; Cooper, SW, 'Considering "Power" in Separation of Powers' Standard Law Review, 1994, 362-363; Levi, EH, "Some aspects of separation of Powers" Columbia Law Review 1976, Vol 76, 370-374; Van der Vyver , JD "Political Power constraints and the American Constitution" SALJ, 1987, 419; idem "The separation of powers" SAPR/PL,1993, 177.

In 1748 Montesquieu published *"The Spirit of the Laws".*[76] The work was profoundly influenced by the post-1688 English Constitution and was the first fully developed theoretical recognition and formulation of the doctrine of separation of powers. It had a significant influence on all subsequent European and colonial constitutions and upon subsequent political and legal thought.

His justification of the separation of the judicial power from the other two powers is found in Chapter 6 of Book Eleven where he wrote:

> Again there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[77]

In this chapter entitled *On the Constitution of England,* lies the core of Montesquieu's exposition of the doctrine when he opines:

> When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.

[76] Montesquieu, Charles de Secondat, baron de. The Spirit of Laws (c.1748). Translated and edited by Anne Cohler, Basia Miller, Harold Stone. (New York: Cambridge University Press, 1989).
[77] Ibid; Chapter Six of Book Eleven; On the Constitution of England.

> Nor is there liberty if the power of judging is not separate from legislative power or from executive power. If it were joined to legislative power, the power over the life and liberty of the citizen would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.
>
> All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.[78]

The rationale behind separation of powers, to prevent abuse of powers, is apparent throughout this passage. It is arguable that Montesquieu is the founder of the doctrine of separation of powers but what is incontestable is that he propagated it most effectively to the attention of mankind.

In Britain there are numerous conceptions of the doctrine that have been advanced. Wade and Bradley state that the concept of 'separation' may mean three different things:

a. that the same persons shall not form part of more than one of the the organs of government, for example, that Ministers should not sit in Parliament;

[78] ibid

b. that one organ of government should not control or interfere with the exercise of its function by another organ, for example, that the judiciary should be independent of the Executive;

c. that one organ of government should not exercise the functions of another, for example, that Ministers should not have legislative powers."[79]

Framers of the Constitution of Kenya 2010 were greatly influenced by Montesquieus' thought as well as by the post-1688 constitutional arrangements in England having opted for a Presidential system with almost complete legal separation of powers.

### 2.4.3. Definitional Dilemma

Ordinarily the doctrine of separation of powers means that if one of the three arms of government is responsible for the enactment of rules of law, that body shall not also be charged with their execution or with judicial decision about them. The same will be said of the executive authority, it is not supposed to enact law or to administer justice and the judicial authority should not enact or execute laws. Lord Mustill in *R v Home Secretary, Ex p Fine Brigades Union*[80] defined the doctrine of separation of powers in England as:

> It is a feature of the peculiarly British conception of the Separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make

[79] Wade. Bradley; Constitutional and Administrative Law 11th Edition page 23.
[80] [1995] 2 at 513 at 567.

> whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.

This understanding of the doctrine which paints a picture of a complete separation of powers is not possible -neither in theory nor in practice. Often times the doctrine of separation of powers does not always have to be strictly applied.

In the first certification judgment, *Ex parte Chairperson of the Constitutional Assembly of the Republic of South Africa*,[81](the First Certification case) the court stated that:

> 'There is, however, no universal model of separation of powers and, in democratic system of government in which checks and balances result in the imposition of restraints by one branch of government upon another, there is no separation of powers that is absolute …'

The court continued at para 109 as follows:

> The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessity or

[81] 1996 (4) SA 744 (CC) at p 810 para 108.

> unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers …

It is discernible from the foregoing that in a constitutional dispensation, the doctrine of separation of powers is not to be regarded as fixed or rigid. The judiciary in interpreting the constitution is duty bound to develop a model of separation of powers that fits the particular system of government provided for in the Constitution. It must be able on the one hand, to control government by separating powers and enforcing checks and balances, and on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest.[82]

The purpose of checks and balances is to ensure that different branches of government control each other internally (checks) and serve as counter weights to the power possessed by the other branches (balances).[83] Judicial review of executive or legislative functions for compliance with the Constitution is the obvious example of the control of exercise of the power of another organ. It is neither a judicial, legislative nor executive function but a mere check on the exercise of their powers.

The foregoing narrative suggests that it is inherently impossible to achieve an absolute separation. It is not a sustainable argument that the existence of formal distinction between the three powers is a compulsory minimum for a democratic

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[82] De Lange v Smuts No and Others 1998 (7) BCLR 779 (CC) at p 804 par 60.
[83] South African Association of Personal Injury Lawyers v Heath, 2001 (1) BCLR 77 (CC) P86 at par 22.

constitutional order. In fact functional separation also appears to be a necessity for the existence of effective checks and balances. Separation at the level of personnel is an area in which there appears to be variances even in the best democracies of the world. Because space exists for legitimate variation in accordance with peculiar circumstances of each case it is impossible to have a fit all definition of separation of powers. Put simply, separation of powers is an institutional vision in search of an ideal.

In Kenyan judicial practice, the doctrine of separation of powers does not stop the judiciary from examining the acts of the executive. Under Article 165(3)(d) of the Constitution, the judiciary is charged with the mandate of interpreting the Constitution; and has the further mandate to determine the constitutionality of acts done under the authority of the Constitution as was held in *Re The Matter of the Interim Independent Electoral Commission*[84] in which the Supreme Court expressed itself as follows:

> The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the Courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that the totality of governance powers is shared out among different organs of government, and that these organs play mutually countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.

[84] Supreme Court of Kenya Advisory Opinion No 2 of 2011.

From the principles enunciated in the above authority, it is clear that the doctrine of separation of powers does not prevent the judiciary from exercising its jurisdiction under Article 165(3)(d). The concern, however, is that so far the courts have failed generally to adequately identify and apply a consistent constitutional, statutory or judicial model of the theory which they so regularly employ. This has generated considerable uncertainty over what the doctrine actually entails – an unacceptable situation for a theory apparently concerned with practical matters of power ordering and distribution.

### 2.5. Judicial Review

The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judiciary as the third branch of government. At what level that takes place is determined by the system of government; whether the Constitution or the legislature is supreme. In jurisdictions like Kenya where the Constitution is supreme there are two types of judicial review. Constitutional [merits] judicial review and statutory judicial review of administration.

#### 2.5.1. Constitutional Judicial Review

Constitutional judicial review is the power of a court to interpret both the provisions of the Constitution, law and conduct and to declare the law or conduct unconstitutional and null and void if it judges the law or conduct to be incompatible with the Constitution. The institution of judicial review in this sense depends upon the existence of a written Constitution. It concerns the

relationship between the legislature, executive and judiciary. Judicial review under the Constitution may be summarised to include:

a) Article 165 (3)(b) to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

b) Article 165 (3) (d) to hear any question respecting the interpretation of the Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of the Constitution;

(ii) the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution;

(iii) any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;

The procedure for constitutional judicial review is found in Article 22(1) wherein "Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened." Further under Article 23(1) "The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or

fundamental freedom in the Bill of Rights." The reliefs available are in terms of Article 23(3) where "In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

The power to grant any of these reliefs including an order of judicial review under (f) does not by any means suppose a superiority of the judicial to the legislative and executive power. It only supposes that the power of the people under the Constitution is superior to both; and that where the will of the legislature or executive stands in opposition to that of the people as declared in Article 1 of the Constitution, the judiciary ought to be governed by the latter rather than the former.

This practice is in stark contrast to judicial review of the actions of administrative agencies [I refer to it as statutory judicial review of administration] that follows.

### 2.5.2. Statutory Judicial Review

Statutory judicial review is the means by which courts determine whether or not administrative bodies and officials have properly respected the boundaries of the powers and functions formally assigned to them in the exercise of public power. The overall ground of statutory judicial review is that the repository of public power has breached the limits placed upon the grant of that power by statute. The focus, therefore, is on the legality of an exercise of power, not the merits of a particular decision.

Authority for judicial review of administration derives from the Fair Administrative Act 2015 which gives effect to Article 47 of the Constitution and the Law Reform Act.

Section 4 entitles every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[85] It also, among other procedural rights, provides that every person has to be given written reasons for any administrative action taken against him.[86]

The other statute is the Law reform Act cap 16 which provides at Section 8(2) that:

> (2) In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938,

[85] Section 4(1)(7)
[86] Section 4(2)

> of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.

The Civil Procedure Act sets forth the procedure for applying for this type of judicial review under Order 53.

The High Court has held that the purpose of Order 53 judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large.[87] This type of review is a feature of parliamentary supremacy where courts are subordinate to the legislature, are bound to enforce and may not declare on the merits or constitutionality of legislative acts. In *R v Judicial Service Commission*[88] the court stated as follows:

> The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or the individual judges for that of the authority constituted by law to decide the matter in question.

[87] Republic v Permanent Secretary/Secretary to the Cabinet and Head Of Public Service Office of The President & 2 Others ex-parte Stanley Kamanga Nganga [2006] eKLR.
[88] Misc. Civil Application No. 1025 of 2003.

The purposes of statutory judicial review can be summarised as intended to first, prevent excessive exercise of powers by administrative bodies and officials second, ensure that an individual is given fair treatment by administrative authorities, third to keep administrative excesses in check and also to provide a remedy to those aggrieved as a result of excessive exercise of power by administrative bodies.

The reliefs granted are more circumscribed will include;

a) a mandatory order;

b) a prohibiting order;

c) a quashing order; or

d) an injunction restraining a person from acting in any office in which he is not entitled to act.

### 2.5.3. Definitional Dilemma

What is judicial review in Kenya does not allow a single definition, is contextual and may refer to one of several procedural approaches that a person may adopt and the approach adopted will lead to different outcomes.

The first approach is judicial review under Articles 23(1) and 165(3) of the Constitution through the High Court and has two intended outcomes, first to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; and second whether any law or conduct

is inconsistent with or in contravention of the Constitution. This approach is concerned with adherence of laws and conduct to fundamental freedoms as well as their constitutionality. This approach is grounded on the idea of constitutional supremacy over the legislature, executive and judiciary with the judiciary as the ultimate interpreter of constitutional meaning.

The second approach is statutory judicial review under section 4 of the Fair Administrative Action Act 2015 and section 8(2) of the Law Reform Act cap 16 where the court conducts an examination of the manner in which a decision was made or an act done or not done. This approach is concerned with procedural fairness and does not get to the substance of issues raised. It is a tool in administrative law for checking the conduct of executive functionaries. This approach is grounded on the idea parliamentary and executive supremacy over the judiciary so that the judiciary may not declare on the constitutionality or legality of a law or act save on procedural aspects.

There is also a third element of review provided for in the Civil Procedure Act cap 21 under Order 45 of the Civil Procedure Rules that empowers a court to review its own judgments and orders. In all three, the expression judicial review has rightly or wrongly been used and there is need for a definitional clarification that would isolate the different ends that are often the result of each approach.

This section has clarified the use of the expression judicial review in the context of this work so it is understood that, there is constitutional, statutory and Order 45 Civil Procedure Act judicial review. Because this project is about judicial

review of executive conduct in national security matters, it is concerned solely with constitutional judicial review.

## 2.6. National Security

This study is about judicial review of executive conduct in national security matters and it is important to understand what national security is. There are many definitions of national security and its dimensions and implications keep changing over time so that any academic attempt at defining it is not without practical implications. The variety of definitions below provides an overview of the many usages of the concept which still remains ambiguous. Such overview also indicates that it originated from simpler definitions which initially emphasised the freedom from military threat and political coercion to later include other forms of non-military security as suited the circumstances of the time.[89]

### 2.6.1. National Security in the Constitution and the National Intelligence Service Act, 2012

The starting point is the constitution which defines national security at Article 238.(1) as follows;

[89] Romm, Joseph J. (1993). Defining national security: the nonmilitary aspects. Pew Project on America's Task in a Changed World (Pew Project Series). Council on Foreign Relations. p. 122. See also Paleri, Prabhakaran (2008). National Security: Imperatives and Challenges. New Delhi: Tata McGraw-Hill. p. 521.

> National security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests.

The article highlights the importance of territorial integrity and sovereignty – as monitored internally within a state's jurisdiction and externally, beyond the state's borders. The other element is the protection of constitutional values as well as political, economic 'and other national interests' (another ambiguous term).

Equating national security to defence of a country, section 2(1) of The National Intelligence Service Act, 2012 interprets the expression "threat" to mean:

> (a) any activity relating to espionage, sabotage, subversion, terrorism, organized crime, or intention to commit any such activity which is or may be directed against, or detrimental to the integrity, sovereignty, economic well-being or other national interests of Kenya and includes any other activity performed in conjunction with any activity relating to espionage, sabotage, organized crime, terrorism or subversion;
>
> (b) any activity directed at undermining, or directed at or intended to bring about the destruction or to overthrow by unlawful means of the constitutionally established system of government in the Republic;
>
> (c) any act or threat of violence or unlawful harm that is directed at or intended to achieve, bring about or promote any constitutional, political, industrial, social or economic objective or change in Kenya and includes any conspiracy, incitement or attempt to commit any such act or threat; and

(d) any action or intention of a foreign power within or outside Kenya that is detrimental to national security and is clandestine or deceptive or involves a threat to the well-being of the Republic and its citizens or any other person lawfully resident in Kenya,

but does not include any lawful advocacy, protest or dissent unless carried out in conjunction with any of the activities referred to in paragraphs (a) to (d);

This basic definition of the national security doctrine continues to morph, is notoriously elusive and there is need for its clarification to safeguard Human Rights.

### 2.6.2. Shifting dimensions of national security.

Walter Lippmann, in 1943, defined national security in terms of war saying that "a nation has security when it does not have to sacrifice its legitimate interests to avoid war, and is able, if challenged, to maintain them by war".[90] A later definition by Harold Lasswell, a political scientist, in 1950, looks at national security from almost the same aspect, that of external coercion: "The distinctive meaning of national security means freedom from foreign dictation."[91]

Arnold Wolfers, while recognising the need to segregate the subjectivity of the conceptual idea from the objectivity, talks of threats to acquired values:[92]

[90] Ibid Romm at p 5
[91] Ibid Romm at p.79
[92] Quoted in Paleri (2008) ibid. Pg 52.

> An ambiguous symbol meaning different things to different people. National security objectively means the absence of threats to acquired values and subjectively, the absence of fear that such values will be attacked.

The 1996 definition propagated by the National Defence College of India accretes the elements of national power:[93]

> National security is an appropriate and aggressive blend of political resilience and maturity, human resources, economic structure and capacity, technological competence, industrial base and availability of natural resources and finally the military might.

Harold Brown, U.S. Secretary of Defense from 1977 to 1981 in the Carter administration, enlarged the definition of national security by including elements such as economic and environmental security:[94]

> National security then is the ability to preserve the nation's physical integrity and territory; to maintain its economic relations with the rest of the world on reasonable terms; to preserve its nature, institution, and governance from disruption from outside; and to control its borders.

Although authorities continued to differ in their choice of national security elements, there had emerged the realisation that to be truly secure a nation

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[93] Definition from "Proceedings of Seminar on "A Maritime Strategy for India" (1996). National Defence College, Tees January Marg, New Delhi, India. quoted in Paleri 2008 (ibid).
[94] Brown, Harold (1983) Thinking about national security: defense and foreign policy in a dangerous world. As quoted in Watson, Cynthia Ann (2008). U.S. national security: a reference handbook. Contemporary world issues (2 (revised) ed.). ABC-CLIO. p. 281.

needs other forms of security besides the military aspect. In 1995 Brian Atwood said;[95]

> Objective analysis - hard-headed thinking - should lead us to conclude that national security today entails more than a defense against missile attack. It involves more than ideological competition. National security policy today must begin with a simple truth: if people elsewhere are destabilizing their regions, flowing across borders as refugees, creating human and environmental catastrophes, then American interests are at risk or will soon be at risk.

He justified his definition by paraphrasing the old philosophical question:[96]

> If a tree falls in a rainforest far away, yes, today we do indeed hear it. We pay the price in global warming and lost species and miracle drugs that are never found. If people in Africa are forced from their homes by conflict, Americans become less secure. We have to feed them or turn our backs. We have to try to restore order or stand aside while chaos spreads. If millions live in poverty, we who live in this global economy are the poorer for their suffering. If rural migrants overwhelm the cities by the tens of millions, we must breathe the air they pollute and drink the water they foul. Their diseases will find us. Their misery will envelop us.

According to Prabhakaran Paleri, author of National Security, Imperatives and Challenges, national security may be defined as:[97]

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[95] Atwood, Brian J US Agency for International Development Administrator, "Towards a New Definition of National Security: The New Strategic Threats," Current History, Vol. 62, no. 5 (December 15, 1995)
[96] ibid
[97] Paleri, Prabhakaran (2008). National Security: Imperatives And Challenges. New Delhi: Tata McGraw-Hill. p. 52-54.

> The measurable state of the capability of a nation to overcome the multi-dimensional threats to the apparent well-being of its people and its survival as a nation-state at any given time, by balancing all instruments of state policy through governance, that can be indexed by computation, empirically or otherwise, and is extendable to global security by variables external to it.

The foregoing definitions are indicative of the shifting dimensions and regional disparity of conceptions of the doctrine of national security. These are factors that would make an objective definition quite challenging.

### 2.6.3. Definitional dilemma.

For the national security doctrine, the core problem lies with the shifting dimensions and regional disparity conceptions of national security and subjective definitions of "national interests". Ideally national security should be demonstrable where states clearly define their interests so as to avoid unnecessary limitations of Human Rights.[98] Pragmatically the tendency of political and economic interests to alter over time makes a definition of national security interests probably unattainable. For this project the challenge is to be able to distinguish a genuine and consistent understanding of national security so as to be able to protect it from partisan executive abuse leading to limitation rights of citizens.

[98] Emmerson, Ben, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Framework principles for securing the human rights of victims of terrorism, United Nations General Assembly (2012) http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-14_en.pdf

## 2.7. Sources of authority for judicial review.

Whenever, in a rule of law regime, the judiciary has to determine legality of executive conduct in matters of national security, it has to ground such determination on law. This section identifies the various provisions that are authority for judicial review.

The doctrine of judicial review has numerous bases in the Constitution of Kenya 2010. Article 165(3) (d) sets out the express constitutional underpinning for judicial review of legislation,[99] executive conduct[100] and conduct of state organs in respect of counties.[101]Article 165(b) also empowers the High Court to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.[102]All these are constitutional provisions that expressly empower the judiciary to review legislation, executive conduct and matters bearing on devolution of government.

Judicial review authority also has a strong basis and can be construed from the text of the Constitution. First, Article 2 (1) the Supremacy Clause expressly states that a form of judicial review exists:

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[99]Article 165 (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—(i) the question whether any law is inconsistent with or in contravention of this Constitution;

[100] Article 165(d)(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

[101] Article 165(d) (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;…

[102] (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

> This Constitution is the supreme *law* [emphasis] of the Republic and binds all persons and all State organs at both levels of government.

The Constitution by proclaiming itself law, invites and suggests that judges should interpret it. Second, the Constitution provides at article 2(4) that;

> Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

That suggests that only statutes consistent with the Constitution are law. Since judges have a role in determining that a statute conflicted with the constitution (as opposed to the alternative possibility that the parliament would have the exclusive power to make that determination), this provision although open to other interpretations, more significantly suggests that courts can review legislation to determine constitutionality.

Third are other openings for constitutional judicial review but which have not been the source of extensive analysis in Articles 22 and 258 of the Constitution.

In terms of Article 22 (1) "Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened." Such person may be acting in his own or in the interests of others or an association. In furtherance of this, the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012 have been enacted.

In terms of Article 258 (1) "Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention." Such proceedings may be instituted by a person acting in his own or in the interest of others.

The three provisions confer on the High Court the jurisdiction to undertake judicial review of executive and legislative action by the government and its officers— it confers jurisdiction in respect of any matter arising under the Constitution or involving its interpretation and arising under the laws made by the Parliament and in particular, to ensure that such action is carried out within limits imposed by the Constitution and any valid statute.

Still unclear is the central question of capacity. The rules relating to standing for constitutional judicial review are complex and still evolving. It appears there is no single test for standing that applies to all the remedies, although there are some common threads. Broadly speaking, a person will have standing to seek judicial review if they are adversely affected by executive action in the sense that they have a special interest in the subject of the decision or would be adversely affected by the outcome.[103]

### 2.8. Significance of judicial review

The principles of judicial review give effect to the Rule of Law and are important mainly because without it the Constitution would be nothing but a piece of

[103] Article 258 (1).

paper. The Constitution states that it is the supreme law of the land and there has to be an authority to decide whether a particular law or conduct is constitutional or unconstitutional.[104] Judicial authority has always included the power to interpret laws and the Constitution has given the judicial branch the power over all cases arising under the Constitution and courts must be able to interpret both the Constitution and laws and to determine whether one prohibits the other.

The jurisdiction conferred on the High Court by Article 165(3) is also a crucial part of the doctrine of the separation of powers. Underlying this doctrine is the principle that a strict separation of power between the executive, legislative and judicial branches of government will help preserve democracy and protect citizens from any abuse of government power. The text of the Constitution reflects the separation of powers at a textual level, with provisions relating to the legislative branch in Chapter 8, provisions relating to the executive branch in Chapter 9, and provisions relating to the judicial branch in Chapter 10. This arrangement has been construed as requiring that judicial power be exercised only by courts vested with jurisdiction in accordance with Chapter 10. It is an exercise of judicial power finally to determine whether or not conduct of the

[104] The High Court (W. K. Korir, J.) has held that the purpose of judicial review is to ensure that public bodies and officials perform their functions in good faith, without malice and in accordance with the law, and that once the court has clarified the law the public body may decide to retake the decision or abandon the decision altogether. *Republic v The Judicial Service Commission & another ex parte Joyce Manyasi* [2012] eKLR J. R. Application No. 299 of 2011 High Court of Kenya at Nairobi Weldon K. Korir, J. July 4, 2012.

executive branch is lawful. In this way the doctrine provides a constitutional basis for judicial review.

In Kenya, judicial review represents an important element in a comprehensive justice system. Within this scheme, judicial review has a number of important functions listed below.

### 2.8.1. An element of the rule of law

The Constitution at article 165 (3) underscores the significance of judicial review as an element of the rule of law. The ability of the courts to judicially review executive conduct in matters of national security is an element of the rule of law.[105] In *R. v. Committee of the Lords of the Judicial Committee of the Privy Council acting for the Visitor of the University of London, ex parte Vijayatunga (1987*),[106]Judge Simon Brown said: "Judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law".[107] In Australia it has been stated that:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by the law and the interests of the individual are protected accordingly.[108]

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[105] Joseph Raz (1977), "The Rule of Law and Its Virtue", Law Quarterly Review 93: 195–211 at 201.
[106] [1988] Q.B. 322, High Court (Queen's Bench) (England & Wales).
[107] *Ex parte Vijayatunga*, p. 343, cited in *R. (Cart) v. Upper Tribunal* [2010] EWCA Civ 859, [2011] Q.B. 120 at 137, para. 34, Court of Appeal (England and Wales).
[108] *Church of Scientology v Woodward* (1982) 154 CLR 25, 71 per Brennan J.

As also noted:

> Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.[109]

In Singapore, judicial review as a check on executive power was noted by the Court of Appeal in *Chng Suan Tze*,[110] which held that all power given by law has legal limits and that "the rule of law demands that the courts should be able to examine the exercise of discretionary power".[111] This is further illustrated by *Law Society of Singapore v. Tan Guat Neo Phyllis (2008*),[112] in which it was stated that prosecutorial discretion is subject to judicial review and may be curtailed where exercised in bad faith or for extraneous purposes, or is in contravention of constitutional rights.[113] It is the role of the courts generally to give litigants their rights, whilst simultaneously playing a supporting role in the promotion of good

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[109] *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 157 per Gaudron J.
[110] *Chng Suan Tze v. Minister of Home Affairs* [1988] SGCA 16, [1988] 2 S.L.R.(R.) 525, Court of Appeal (Singapore),
[111] *Chng Suan Tze*, p. 553, para. 86
[112] *Law Society of Singapore v. Tan Guat Neo Phyllis* [2007] SGHC 207, [2008] 2 S.L.R.(R.) 239, High Court (Singapore).
[113] *Tan Guat Neo Phyllis*, pp. 312–313, paras. 148–149.

governance through the articulation of clear rules and principles by which the executive can conform with the rule of law.[114]

However, certain matters are regarded as not amenable to judicial review owing to limitations in the courts' institutional capacity. For example, courts are generally reluctant to get involved in affairs relating to national security, leaving this role to the executive. At the same time courts are committed to careful scrutiny of matters to decide whether they are indeed non-justiciable and generally exclude matters involving "high policy" from their purview after analysis to determine whether or not they truly fell within areas of executive immunity.[115]

### 2.8.2. An aid to accountability

Judicial review of executive conduct in matters of national security is an important part of executive accountability. It ensures that decision makers are accountable for the decisions they make and that there is a mechanism in place to test the lawfulness of executive decisions. It is a mechanism through which individuals are entitled to bring an action in the courts to enforce a right or protect an interest by stopping unlawful conduct of the government or its agents.

[114] Chan Sek Keong (September 2010), "Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (PDF), Singapore Academy of Law Journal 22: 469–489 at p. 485, para. 44.
[115] *Lee Hsien Loong v. Review Publishing Co. Ltd.* [2007] 2 S.L.R.(R.) 224, H.C. (Singapore).

'The most obvious benefit brought by judicial review is that it forces care in administrators and reviewers in their adjudicative process'.[116] Further:

> …one by-product of judicial review as an accountability measure is that it can encourage independence and integrity. A decision-maker whose ruling is subject to curial oversight is less likely to toe a particular policy line or succumb to political pressure to decide cases in a particular way. The courts offer security to those who make a bona fide attempt to make findings on the facts and the law as presented and sanctions for those who choose to act on arbitrary or capricious considerations.[117]

The judiciary has the power through judicial review mechanisms to review executive conduct in matters of national security. This power encompasses the authority of the court both to review the constitutionality or validity of executive conduct and to pass upon their constitutionality or validity, and to disregard, or direct the disregard of such acts as are held to be unconstitutional.[118]

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[116] Mary Crock, 'Privative Clauses and the Rule of Law: The Place of Judicial Review Within the Construct of Australian Democracy, in S Kneebone (ed) Administrative Law and the Rule of Law: Still Part of the Same Package?, Australian Institute of Administrative Law, 1999, 57, 80.
[117] ibid
[118] Paul Craig (2008) Administrative Law, Sweet & Maxwell, London; Peter Kaluma (2009) Judicial Review: Law Procedure and Practice LawAfrica Publisher, Nairobi ; F.P. Feliciano, "The application of law: some recurring aspects of the process of judicial review and decision making" 1992 American Journal of Jurisprudence 17-56, 19. See also Gichira Kibara (2011) "Reforming the Judiciary: Responsiveness and accountability of the Judiciary," A study under the auspices of the Friedrich Ebert Stiftung (FES) and University of Nairobi's Department of Political Science & Public Administration, Occasional Paper Series, Nairobi, presented at the FES and UoN workshop, Nairobi Safari Club, November 2011.

### 2.8.3. Consistency and precedent

Precedent viewed against passing time can serve to establish trends, thus indicating the next logical step in evolving interpretations of the law. Judicial review rulings of the courts are of precedential value and can provide direction on desirable executive conduct. As noted by the Law Council of Australia in the context of its submission on the Migration (Judicial Review) Bill 1998:

> The Refugee Review Tribunal…deals with complex legal issues…The courts provide interpretation of legislative provisions and on the relationship between old and new laws. Both the Refugee Review Tribunal and the Immigration Review Tribunal, like most tribunals, often see differences of opinion arise between the way particular members interpret the relevant legislation…court decisions are normative and binding on tribunal members. The fostering of consistency between members and the knowledge of the correct interpretation of a certain provision are benefits for all those involved in the immigration process, from applicants, departmental decision makers through to review officers.[119]

### 2.8.4. An individual right

Under Article 3(1) every person has an obligation to respect, uphold and defend the Constitution. In terms of Article 22(1) "Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened." An individual's

[119] Submission of the Law Council of Australia to the Senate Legal and Constitutional Legislation Committee Inquiry into the Migration Legislation Amendment Bill (No 2) 1998, Migration (Visa Application) Charge Amendment Bill 1998 and Migration (Judicial Review) Bill 1998, Submission No 5, 18 January 1998,

right to review of decisions in relation to executive conduct is as important as the entitlement to bring an action in the courts to enforce a right against a fellow citizen.[120] The procedure safeguards individual rights by allowing individuals to bring an action in the courts to enforce a right or protect an interest by stopping unconstitutional conduct of the government or its agents.

In summary:

> …judicial review plays an important part, in a highly public way, of declaring, reasserting and supporting important standards necessary to the rule of law expressed in the delivery of administrative justice as well as addressing departures from those standards in individual cases.[121]

## 2.9. Scope of judicial review: Introduction.

### 2.9.1. Factors relevant to scope of judicial review

#### 2.9.1.1. The structure of the Constitution

Judicial review in Kenya is very much the consequence of the structural regime established by Chapters 8, 9 and 10 of the Constitution, particularly the concept of the Separation of Powers. Considerations of constitutional structure define not only the significance of judicial review, but also its limits.

A very important consequence of the separation of powers for constitutional review system is that a court can exercise judicial power whereas in statutory

[120] Former Chief Justice of Australia, Sir Anthony Mason AC KBE, 'The Importance of Administrative Action as a Safeguard of Individual Rights' (December 1994) 1(1) Australian Journal of Human Rights 3.
[121] Justice R S French, 'Judicial Review Rights' (March 2001) 28 AIAL Forum 30, 32.

judicial review decisions it cannot. Statutory judicial review under the Law Reform Act is complementary to but distinct from Constitutional judicial review under Article 165(3). Whereas the object of constitutional judicial review is to ensure that 'the correct or preferable' decision is made on the material before the decision-maker, statutory judicial review is directed towards ensuring that the decision made was properly made within the legal limits of the relevant power.

In deference to separation of powers, the courts acknowledge the need to maintain the margins between statutory and constitutional judicial review. It has been argued that if the courts were in statutory judicial review to assume a jurisdiction to review acts or decisions which are unfair in the opinion of the court – not the product of procedural unfairness, but unfair on the merits – the courts would be assuming a jurisdiction to do the very thing which is to be done by the executive, namely, making policy. If judicial review were to trespass on the exercise of executive power, it would put its own legitimacy at risk.[122]

#### 2.9.1.2. Parliament

Parliament is able to define the scope of judicial review. The first is Parliament's capacity to make laws expanding the availability of judicial review beyond that provided for in the Constitution. The second are the various mechanisms available to Parliament should it seek to remove or limit the scope of judicial review.

[122] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37-38 per Brennan J.

Under Article 23 (2) of the Constitution Parliament is empowered to legislate to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. This provision does not entrench any jurisdiction to undertake judicial review but does empower Parliament to confer jurisdiction in the broadest terms on subordinate courts to undertake judicial review of executive action.

Article 162(2) of the Constitution gives Parliament power to make laws defining the jurisdiction of any court with the status of High Court with respect to, among other things, employment, labour relations, the environment, the use and occupation of and title to land. Parliament can under sub Article (3) determine the jurisdiction and functions of the courts.

These provisions illustrate that the Parliament has significant legislative power to extend judicial review beyond what is expressed in the Constitution.

On the converse, Parliament has power to limit or remove any judicial review jurisdiction that it has created, so long as any limitation does not infringe the Constitution and so long as the limitation is sufficiently clearly expressed.

The High Court may also grant a constitutional remedy if an exercise of power by a member of the executive is such that he has failed to comply with a duty, the content of such duties—and, in fact, whether the duties exist at all—can be varied by Parliament (within the limits of the Constitution).

It is also open to Parliament to legislate in a particular context to contain the requirements of procedural fairness but laws of this kind simply limit the potential applicability of the grounds of review to a particular factual situation.

It is equally the case that Article 166(3) of the Constitution vests in the High Court a jurisdiction for judicial review that provides an irreducible minimum basis for challenging executive conduct; that is, Parliament does not have legislative power to remove this jurisdiction.

The foregoing discussion shows that there are a number of ways in which, if it chooses to do so, Parliament can expand or limit the scope of judicial review in the context of particular decision-making powers.

### 2.9.2. Scope of judicial Review: Limits.

A development of profound constitutional significance for judicial review in Kenya was the promulgation of the Constitution of Kenya 2010. It enables citizens to vindicate the rights and liberties guaranteed by the Bill of Rights in courts.[123] It marks a shift to a rights based system. It requires judges to examine allegations of abuse of power from the perspective of what is necessary in a democratic society.[124]Articles 10 and 20 will contribute greatly to the

[123] Article 22. (1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

[124] Article 10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
(a) applies or interprets this Constitution;
(b) enacts, applies or interprets any law; or
(c) makes or implements public policy decisions.
(2) The national values and principles of governance include—

constitutionalisation of our public law. It creates a new and higher legal order. It poses great challenges for the judiciary which must now apply constitutional methods of interpretation over a wide spectrum of cases.

Articles 10 and 20 imposes an interpretative obligation on courts requiring them to interpret all legislation, primary and subordinate, whenever enacted, in a way which is compatible with the Bill of Rights. The Articles enable the courts to take the Bill of Rights into account in resolving any ambiguity in a statute.

Unlike in the past when the search has been for the one true meaning of a statute, under the 2010 Constitution, the search will be for a possible meaning that would prevent the need for a declaration of inconsistency or contravention under Article 165(3). The questions that courts now have to ask will be: (1) What meanings are the words capable of yielding? (2) And, critically, can the words be made to yield a sense consistent with the Bill Rights?

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(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
(c) good governance, integrity, transparency and accountability; and
(d) sustainable development.
See also Article 20. (1) The Bill of Rights applies to all law and binds all State organs and all persons.
(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.
(3) In applying a provision of the Bill of Rights, a court shall—
(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.
(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—
(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and
(b) the spirit, purport and objects of the Bill of Rights.

The courts will now have to use new methods of solving problems. The cherished concept of Wednesbury unreasonableness no longer provides all the answers.[125] Now the important issue is whether an interference with a right is justified by a legitimate aim and 'is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors'.[126] Moreover, there will be no place for formalism and courts have to look behind the appearances and investigate the realities of the impact on individuals of a procedure, practice or decision which is under scrutiny. In order to filter out insubstantial complaints courts must apply the principle that for conduct to constitute a breach of a provision of the Bill of Rights, it must attain a minimum level of severity for without it courts would be swamped with trivial complaints.

A core provision of the Constitution is Article 50, which contains the guarantee of a fair trial. It will be the prism through which diverse aspects of our justice system will have to be re-examined. The principal battleground will be the criminal courts. But the influence of the Bill of Rights will be general and

[125] *Associated Provincial Picture Houses v. Wednesbury Corporation* [ 1948 ] 1 KB 223

[126] See Article 24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right or fundamental freedom;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

pervasive. Often the values underlying the Bill of Rights will be in collision. *Isaiah Berlin* wrote:[127]

> Both liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for wolves is death to the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted. . . . Equality may demand the restraint of the liberty of those who wish to dominate; liberty - without some modicum of which there is no choice and therefore no possibility of remaining human as we understand the word - may have to be curtailed in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, to leave room for the liberty of others, to allow justice or fairness to be exercised.`

Courts will sometimes have to balance the protection of the fundamental rights of individuals against the general interest of the community. Individualized justice and the stability needed in any democratic society may be in contention. Often courts will have to choose between competing values and to make sophisticated judgements as to their relative weight.

#### 2.9.2.1. Who and what may be reviewed?

A preliminary question in any judicial review application is usually whether a decision is capable of being judicially reviewed? This question has two quite distinct sub-questions:

1. Does the court have jurisdiction to review the particular decision?

[127] The Crooked Timber of Humanity, Fontana Press, 1991,12-13.

2. Assuming the decision is reviewable, is the decision justiciable?

It is possible that courts may not see the distinction between these inquires or may fail to state whether their rationale for non-intervention is a jurisdictional or non-justiciability concern. Such questions of jurisdiction and justiciability whenever they arise have traditionally been explored through a matrix combining both institutional (decision-maker is public or private) and functional (decision is public or private) perspectives.[128]Interpretation is the third but less obvious device that courts use to determine the extent to which a given decision may be examined via judicial review. Jurisdiction, justiciability and interpretation are techniques deployed by courts in order to establish the availability and appropriate intensity of review. The techniques provide answers to the question: Who and what may be reviewed?

It is significant to clarify that judicial review over administrative action under the Law Reform Act cap 16 operates under a statutory scheme and has evolved on the lines of common law doctrines such as 'proportionality', 'legitimate expectation', 'reasonableness' and principles of natural justice. Its parameters are well established. This project is about the more novel constitutional review under article 165(3) whose precise boundaries are not clearly defined because, unlike statutory decisions, there is not a source to define the limits of decision makers' powers save for constitutionality. Following is a look at jurisdiction,

[128] Paul Radich and Jessica Hodgson, Public Law (NZLS, Wellington, August 2006) page 18; McGechan on Procedure (Brookers, Wellington, 1995-) para HR 622.Intro.07.

justiciability and interpretation techniques in an attempt to indicate a possible scope of judicial review.

### 2.9.2.2. Jurisdictional limits

The jurisdiction of any court provides the foundation for its exercise of judicial authority. As a general principle, where a court has no jurisdiction, it has no basis for judicial proceedings much less judicial decision or order. The applicable standard remains the statement of the Court of Appeal in *The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd*[129] where it was stated:

> "Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."

The issue of the jurisdiction turns on the constitutional provision constituting and investing the Court with judicial authority. The High Court has jurisdiction under Article 165 (3) (d) (ii) of the Constitution to hear any question respecting the interpretation of the Constitution including the determination of a question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution.

[129] [1989] KLR 1.

#### 2.9.2.2.1. The wording of Article 165(3)(b).

Under Article 165(3) (b) the courts have 'jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;' and

> '(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
>
> (i) the question whether any law is inconsistent with or in contravention of this Constitution;
>
> (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
>
> (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government;'

Under this Article the High Court has the power in sub article (d) to rule on the constitutionality of legislative as well as administrative actions whereas under sub article (b) it has the power through judicial review to protect and enforce the fundamental rights guaranteed in Chapter Four of the Constitution.

Hence the scope of judicial review in the Constitution of Kenya is set to evolve in a number of directions – first, to ensure constitutionality of legislation,[130] second

[130] 165(d) (i) the question whether any law is inconsistent with or in contravention of this Constitution;

to ensure fairness in administrative action, third, to ensure constitutionality of conduct under any law or the constitution,[131] fourth to rule on questions of constitutional relationship between the central and the county governments,[132]and fifth to protect the constitutionally guaranteed fundamental rights of citizens.[133]

The power of the High Court to enforce fundamental rights is derived from Article 23 of the Constitution. It gives citizens the right to directly approach the High Court for seeking remedies against the violation of these fundamental rights.

This entitlement to constitutional remedies is itself a fundamental right and can be enforced in the form of court orders or by issuance of writs evolved in common law.[134]

Article 22(2) now enables 'people-friendly' procedures. The foremost change takes the form of the dilution of the requirement of 'locus standi' for initiating

[131] 165(d)(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
[132] 165(d)(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
[133] 165 (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
[134] (3) In any proceedings brought under Article 22, a court may grant appropriate relief, including—
(a) a declaration of rights;
(b) an injunction;
(c) a conservatory order;
(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
(e) an order for compensation; and
(f) an order of judicial review.

proceedings. Since the intent of Article 48[135] is to improve access to justice for those who are otherwise too poor to move the courts or are unaware of their legal entitlements, the Constitution allows actions to be brought on their behalf by social activists and lawyers.[136] All the foregoing is because Kenya has a written Constitution and so it is possible to define the boundaries of judicial review by choosing words in the Constitution and attaching meaning to them that define limits.

The jurisdiction conferred under Article 165(3) is broad enough as to allow the court to evaluate and assess whether conduct is in accordance with the law, fairness and justice. If for example, in the case of an appointment, the process of appointment is unconstitutional, wrong, unprocedural or illegal, it cannot be argued that after the process is complete the Court has no jurisdiction to address the grievances raised by the parties. The jurisdiction of the Court is dependent on both the process and constitutionality of appointment. In this sense if a State Organ or officer does anything or omits to do something under the authority of the Constitution and which contravenes that Constitution, that act or omission when so proved before the High Court is invalid.[137]

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[135] Article 48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

[136] Article 22(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
(a) a person acting on behalf of another person who cannot act in their own name;
(b) a person acting as a member of, or in the interest of, a group or class of persons;
(c) a person acting in the public interest; or
(d) an association acting in the interest of one or more of its members.

[137] *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR CIVIL APPEAL NO. 290 OF 2012.

From the wording of the Constitution the scope of judicial review entails ensuring consistency with the Constitution while declaring contravention whenever it occurs. Beyond the Constitution there is no statute that defines the appropriate scope of judicial review and the precise application of constitutional judicial review to exercises of non-statutory power remains unclear.

**2.9.2.2.2. The Public sphere.**

Judicial review is only available against a public body in a public law matter.[138] In essence, two requirements need to be satisfied. First, the body under challenge must be a public body whose activities can be controlled by judicial review. Secondly, the subject matter of the challenge must involve claims based on public law principles not the enforcement of private law rights.[139]

There are, however, major difficulties with the public–private demarcation and there is need to record some caveats about the nature of the inquiry. It has been noted that[140] questions such as this raise the full gamut of contextual factors; the outcome will depend on "a careful analysis of the nature of the decision maker and of the subject matter (nature) and surrounding circumstances of the decision".[141] The outcome tends to depend on an overall evaluative judgment or assessment of these factors, not formalistic application of precedent.

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[138] Section 3(d) of the Interpretation and General Provisions Act defines a "public body" as follows: "any authority, board, commission, committee or other body whether paid or unpaid which is invested with or is performing, whether permanently or temporarily functions of a public nature".
[139] Ssekaana Musa Public Law in East Africa (2009) LawAfrica Publishing, Nairobi, page 37.
[140] Ibid at 18.
[141] Ibid at 18.

Fundamental to the consideration of issues of jurisdiction or justiciability is the demarcation between the public and private sphere.[142] The question of what constitutes a public body is not an easy one to determine. This problem was recognized by the Court of Appeal in *Peter Okech Kadamas vs. Municipal Council of Kisumu,*[143] where Platt, JA expressed himself as follows:

> The order of judicial review is only available where an issue of "public law" is involved but the expressions "public law" and "private law" are recent immigrants and whilst convenient for descriptive purposes must be used with caution, since the English Law traditionally fastens not so much upon principles as upon remedies. On the other hand to concentrate upon remedies would in the present context involve a degree of circuitry or levitation by traction applied to shoestrings, since the remedy of certiorari might well be available if the health authority is in breach of a "public law" obligation but would not be if it is only in breach of a "private law" obligation.

In general terms, public functions are subject to public law standards and mechanisms; private activities are subject to private law expectations and remedies.

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[142] See Mark Freedland, "The Evolving Approach to the Public/Private Distinction in English Law" in Mark Free1 and and Jean-Bernard Auby (eds) The Public Law/Private Law Divide (Hart Publishing, Oxford, 2006) 93. Also, see generally, the excellent collection of essays in Michael Taggart (ed), The Province of Administrative Law (Hart Publishing, Oxford, 1997).
[143] Civil Appeal No.109 of 1984 [1985] KLR 954; [1986-1989] EA 194.

### 2.9.2.3. Justiciability limits.

Justiciability concerns the limits upon legal issues over which a court can exercise its judicial authority.[144] A case must be capable of being decided by a court since not all cases brought before courts are accepted for their review. Essentially, justiciability in law seeks to address whether a court possesses the ability to provide adequate resolution of the dispute and where a court feels it cannot offer such a final determination, the matter is not justiciable.

Article 50(1) of the Constitution of Kenya under the heading 'Fair hearing', provides:

> 'Every person has the right to have any dispute that can be resolved *by the application of law* [emphasis mine] decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.'

This article requires that a dispute must be one that can be resolved by application of the law and legislation which prevents or inhibits judicial resolution of a dispute, or which constitutes an impediment to a person's constitutional right to have disputes resolved, may be challenged in terms of this clause.

The concept of justiciability reflects the principle that the function of the courts is to resolve disputes between parties, not to decide academic questions of law.

[144] May, Christopher N.; Ides, Allan (2007). Constitutional Law: National Power and Federalism (4th ed.). New York, NY: Aspen Publishers. pp. 97–99.

This is a principle to which our courts adhere, but one which is undergoing radical change.

A court has no jurisdiction to deal with academic, hypothetical and abstract issues as jurisdiction in interpreting the Constitution is not to be exercised in the absence of a real dispute. This was the holding in *John Harun Mwau & 3 Others v Attorney General and 2 Others* where the court stated thus;

> We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3)(d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy.[145]

The High Court had occasion to deal with justiciability or the political question doctrine on several occasions. In *Trusted Society of Human Rights Alliance vs Attorney General & Others*[146] the Court differentiated a justiciable controversy (which is amenable to judicial review) and a policy decision by the political branches of government (which is a "political question" inappropriate for judicial review). The court stated thus;

> The justiciability doctrine expresses fundamental limits on judicial power in order to ensure that courts do not intrude into areas committed to the other branches

[145] Petition No. 65 of 2011
[146] Petition No 229/2012

> of government. The arguments on this issue are based on the foundational doctrine of separation of powers and its application to the case at hand.[147]

In *Patrick Ouma Onyango & 12 others Vs Attorney General and 2 others*[148] the court asked whether it should interfere with a political or legislative process stated:

> The answer the court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of common sense and the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters.[149]

The court in stating the above relied on *Blackburn vs Attorney General*[150] and particularly the decision of Salmon L.J; who stated that:

> Whilst I recognise the undoubted sincerity of Mr. Blackburn's views I deprecate litigation the purpose of which is to influence political decisions. Such decisions have nothing to do with the courts. These courts are concerned only with the effect of such decisions if and when they have been implemented by legislation. Nor have the courts any power to interfere with the treaty-making power of the sovereign. As to Parliament, in the present state of the law it can enact, amend

[147] ibid
[148] Nairobi, High Court Misc. App. 677 of 2005 (O.S) [2005] eKLR
[149] ibid
[150] [1971] 1 WLR 1037

and repeal any legislation it pleases. The role and power of the court is to decide and enforce what is the law and not what it should be now or in the future.[151]

The decisions above would only point to the fact that the Court can only invoke its mandate to interpret the Constitution under Article 165 (3)(b) if there is a real issue in controversy and not in a hypothetical or academic situation. Before agreeing to hear a case, a court first examines its justiciability. This preliminary review does not address the actual merits of the case, but instead applies a number of tests based on judicial doctrines. At their simplest, the tests concern (1) the plaintiff, (2) the adversity between the parties, (3) the substance of the issues in the case, and (4) the timing of the case. For a case to be heard, it must survive this review.

Settled law requires that in order for a court to hear a case, several justiciability doctrines must be met: there must be standing; the case must be ripe; it must not be moot; and it must not present a political question.[152] The entire area of justiciability is a morass that confuses more than it clarifies and so many commentators have tended to concentrate on specific justiciability doctrines, and have lamented about their incoherence.[153]

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[151] ibid

[152] For a description of each of these doctrines see E Chemerinsky;, *Federal Jurisdiction* 37-145 (1989).

[153] See e.g, J. Vining, Legal Identity 1 (1978) (it is impossible to read the standing decisions "without coming away with a sense of intellectual crisis. Judicial behaviour is erratic, even bizarre. The opinions and justifications do not illuminate."); Fletcher, The Structure of Standing, 98 YALE LJ. 221, 221 (1988) ("the structure of standing law in the federal courts has long been criticized as incoherent"); Winter, The Problem of Standing and the Metaphor of Self Governance, Vol 40 STAN L REV. 1371, 1372 (1988)("one of the traditional criticisms of standing law is that it is confusing and seemingly incoherent."); see also Bandes, The Idea of a

### 2.9.2.4. Political Question

The political question doctrine—that courts should abstain from resolving constitutional issues that are better left to other departments of government, mainly the political branches—has been most ambitiously, and authoritatively, defined by the United States Supreme Court in *Baker v. Carr*:[154]

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due to coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[155]

In the 1983 Nigerian case of *Onuoha v Okafor (Onuoha),*[156] the Supreme Court laid down two principles by which to determine political questions, based on the principles developed by the US Supreme Court.[157] It defined the political question doctrine in Nigeria as consisting of two principles. One is that '[t]he lack of a satisfactory criteria (sic) for judicial determination of a political question is

Case 42 STAN L REV.227,228 (1990)(analysis of justiciability has focused on individual doctrines)

[154] 369 U.S. 186 (1962).

[155] Ibid. at 217.

[156] *Onuoha v Okafor (Onuoha)* (1983) NSCC 494.

[157] The Court relied on *Baker v Carr* 369 US 186 (1962).

one of the dominant considerations in determining whether a question falls within the category of political questions'.[158] The other is '[t]he [appropriateness] of attributing finality to the action of the political department and political parties under the Nigerian Constitution and system of government'.[159]

In summary, a "political question" is a substantive ruling by a court that a constitutional issue regarding the scope of a particular provision should be authoritatively resolved not by the court but rather by one (or both) of the political branches. In a more refined approach, Professor Mark Tushnet describes the political question "issue" in two separate ways: (1) "Who gets to decide what the right answer to a substantive constitutional question is?" and (2) "Does the Constitution give a political branch the final power to interpret the Constitution?"[160]

The United States Supreme Court, whenever it has had to decide on whether to relegate questions of constitutional interpretation to the political branches, has often been guided by four criteria.

**i. Textual Commitment**

The first is that it refrains from deciding political questions where there is a commitment in the text of the Constitution to a coordinate political department—

[158] Supra note 239 at 507
[159] Ibid
[160] Mark Tushnet, Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine, 80 N.C. L. REV. 1203, 1233 (2002) (contrasting the Warren Court's assertion of judicial supremacy and use of prudential decision making with that of the Rehnquist Court) at 1207.

that is, when the Constitution itself is interpreted as clearly referring the resolution of a question to an elected branch.[161] This textual commitment to a co ordinate branch is perhaps the most straightforward as it involves the separation of powers doctrine and therefore the allocation of power among the three branches of state power. It is a very logical proposition that if the text of the Constitution[162] or the original understanding of its meaning, as reflected in its "structure and underlying political theory," persuasively leads to the conclusion that the elected branches rather than the Court should be the final arbiter of its meaning, then the courts should keep off.

**ii. Institutional competence**

The Second is a functional rather than a textual approach, which mandates that when judicial review is thought to be unnecessary for the effective preservation of the constitutional scheme, the Court should decline to exercise its interpretive authority. This criterion, like the first, concerns separation of powers but like the third and fourth below, focuses on the functional role of judicial review rather than on constitutional text and original understanding. Its basic rationale is grounded on notions of institutional competence. By abstaining when the political branches may be trusted to produce a sound constitutional decision, the courts reduce the discord between judicial review and majoritarian

[161] *Baker v. Carr,* 369 U.S. 186, 217 (1962).
[162] See *Speaker of National Assembly v Njenga Karume* [2008] 1 KLR 425, which held that:- "In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

democracy and enhance their ability to render enforceable decisions when their participation is vitally needed. This criterion is a reflection of John Marshall's understanding that the constitutional division of authority is founded largely on questions of institutional competence. Professors Walter Dellinger and H. Jefferson Powell write that:

> Marshall thought that the Constitution expects of political officials no less than of judicial ones the ability and willingness to interpret and apply legal norms. But he did not think that in doing so the politicians could or would renounce politics. Indeed, on some issues only the political capacity to make judgments of prudence and policy can fulfil the Constitution's requirements.[163]

For example, Marshall believed that the constitutionally established power to extradite under a treaty is properly committed to the executive department because only that branch can have a complete view of how this judgment will affect the nation's foreign relations.[164]

On the converse the necessity of upholding constitutionally secured personal liberties is the principal justification for the countermajoritarian power that judicial review confers upon the judiciary. Chief Justice Marshall alluded to this approach in *Marbury* when first raising the notion of a political question, concluding that no judicial involvement is warranted when a claim's "subjects

[163] Walter Dellinger & H. Jefferson Powell, Marshall's Questions, 2 GREEN BAG 2D 367, at 376 (1999).
[164] Speech of the Honorable John Marshall (Mar. 7, 1800), in 18 U.S. (5 Wheat.) app. Note I, at 28 (1820).

are political," thus "respect[ing] the nation, not individual rights . . . ."[165] This distinction exists because, where personal rights of minority interests are at stake, it cannot often be assumed that the majoritarian political process can produce a trustworthy result. Consequently, the Courts should be exceedingly reluctant to find an individual rights claim to be non justiciable, even though it may concern "politics," the political process, or the internal workings of the political branches.[166]

**iii. Judicially Manageable Standards.**

The third criteria is that the Court should not decide issues for which it cannot formulate principled, coherent tests as a result of "a lack of judicially discoverable and manageable standards."[167] The "manageable standards" test belies the logic that, under some circumstances, a practical restraint on justiciability may be necessary. For example, where there are constitutional provisions for which the Court simply lacks the capacity to develop clear and coherent principle to govern litigants' conduct it ought to give way. In *Nixon v. United States*, the Court reasoned that the absence of such manageable standards "may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."[168]It is worth clarifying that this criterion is grounded in judicial incapacity to fashion a governing standard, and not in

[165] 5 U.S. (1 Cranch) 137, 166 (1803).
[166] See generally John H. Ely, Democracy and Distrust (1980).
[167] Supra note 235
[168] 506 U.S. 224 (1993). at 228–29;

the Court's judgment that the political branches ought to have "discretion free of principled rules."[169]

**iv. Generalized grievance**

The fourth criteria which is borrowed from the doctrine of standing is the concept of a "generalized grievance"—a harm by which people injured or affected in a similar way,[170]…a harm that is general and widely shared should be treated as a political question. The logic that belies non justiciability of "generalized grievances" is that in so far as it is all or the majority that is considered to have suffered comparable injury, the decision of the political arm that is responsible to the electoral majority is best placed and trustworthy to represent all affected.

Where the traditional electoral process or other forms of direct political activity are available, it is reasonable that if the majority wishes to reclaim the right, it is a simple matter for it to repeal the legislation rather than to apply for judicial review of it. The generalized grievance criterion manifests most blatantly in a situation in which a majority of voters appears to restrict its own constitutional rights, such as by agreeing to an unevenly apportioned legislature or by imposing term limits for elected officials. In *U.S. Term Limits, Inc. v. Thornton*,[171] the Court

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[169] Alexander M. Bickel, The Least Dangerous Branch 184 (1962) (noting that one element of the political question doctrine is "the Court's sense of lack of capacity . . . [because of] the strangeness of the issue and its intractability to principled resolution") at 186

[170] Justice Scalia has discussed this factor under the heading of standing, see *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 29–37 (1998) (Scalia, J., joined by O'Connor & Thomas, JJ., dissenting), but it seems that his rationale, particularly as articulated in an earlier essay, see Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK. U. L. REV. 881, 896–97 (1983), leads at least equally to the conclusion that this should be treated as a nonjusticiable political question.

[171] 514 U.S. 779 (1995).

invalidated term limits as applied to members of Congress, finding that the requirements for congressional service imposed by the Qualifications Clause were meant to be exclusive.[172] The Court also emphasized the principle that "sovereignty confers on the people the right to choose freely their representatives to the National Government."[173]

These four criteria have a common thread: they identify questions either that the judiciary is ill equipped to decide or where committing the issue to some political branch promises a reliable, perhaps even a superior resolution. Where a question of national security comes up for review by the judiciary, any or several of these criteria may be pleaded by the executive as grounds not to arbitrate the dispute. The section that follows is a discussion of judicial opinions on the "political question" in Kenya.

**v. The Political Question Doctrine in Kenya.**

The appropriate starting point for a discussion of the political question doctrine would be Article 10(1) of the Constitution. It provides that;

> The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
>
> (a) applies or interprets this Constitution;
>
> (b) enacts, applies or interprets any law; or

[172] Ibid. at 837–38.
[173] Ibid. at 794.

(c) makes or implements public policy decisions."…

On a reading of this Article, the Supreme Court has stated that that judicial resolution is not appropriate where it is clear that the political question doctrine will apply.[174] The interpretation of the Constitution is not an exclusive duty and preserve of the Courts but applies to all State organs including Parliament. What is exclusive to the Courts is interpretation of the Constitution within a legal dispute brought in the normal manner before a superior court and which is afforded the necessary processes of appeals, right up to the Supreme Court. Disputes, however, do exist in other forms that require not judicial intervention and determination, but rather resolution of a political nature.[175] In *Patrick Ouma Onyango & 12 others Vs Attorney General and 2 others*[176] the court asked whether it should interfere with a political or legislative process: It stated:

> The answer the court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of common sense and the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters.[177]

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[174] *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others* [2013] eKLR Advisory Opinion Reference No. 2 OF 2013.
[175] Ibid para 256.
[176] Nairobi, High Court Misc. App. 677 of 2005 (O.S) [2005] eKLR
[177] Ibid.

While reiterating that political disputes are formally resolved in Parliament, which is the national arbitration forum for resolving such disagreements the court clarified;

> Politics is a primary tool for squaring out many issues within society but outside of formal judicial channels. Courts should never become arbiters of political differences as the boundaries between what is law and what is politics must be faithfully observed. The matter before this Court raises issues regarding the process of enactment of the Division of Revenue Bill 2013. Before this Court proceeds to address itself on it, it is my opinion, that it must first answer the fundamental enquiry as to whether the division of revenue in itself, is a political or a judicial question? If the answer is to the latter, then by all means the relevant courts may proceed to deal with the issue. If, however, the former is true, then the Supreme Court or any other court for that matter, should not concern itself with this case any further.[178]

What emerges here is that whereas political questions are the preserve of the political arms, determination of what amounts to a political as opposed to a judicial question rests with the judiciary.

The court then went on to rationalise the facts comprising division of revenue as being a process that concerns the application of national resources to development and indeed how the resources will be allocated. The nature of the question is one of perennial debate and argumentative character. It requires a

[178] Ibid para 257.

combination of several political processes of demands, negotiations, debates, stand-offs, retreats and finally resolution. These disputes will also be multi-layered; inter-party, intra-party, inter-regional and even as in this case inter-chamber or internal institutional disagreements.[179] The subject matter of disputes will also be varied and not limited to power sharing, resource sharing, issues of inclusion and exclusion, a plethora of diverse commercial and public/private interests and equitable political representation. Should the courts be involved in these disputes at a policy level?...the only response is a resounding negative.[180]

**vi. Retreat of the political question doctrine.**

Post 2010 Kenyan jurisprudence has seen the retreat, if not the demise, of the political question doctrine. The Supreme Court has charted a new course, retreating from the old principles laid down in *Andrew Lutakome Kayira and Paul Kawanga Semogerere vs. Edwad Rugumayo, Omwony Ojok, Dr. F. E Sempebwa & 8 Others*[181] where it was held by the Court of Appeal of Uganda as follows:

> The removal of Prof. Lule from the office of the Presidency was a political act, which is not justiciable in courts of law but is reserved to political organs of the state. A political question is a question relating to the possession of political power of sovereignty, of government, determination of which is based on Congress and the President whose decisions are conclusive on the courts. The tribunal

[179] Ibid para 258.
[180] Ibid para 259.
[181] Court of Appeal of Uganda Constitutional Case No 1 of 1979.

should be the last to overstep the boundaries, which limit its own foundation. And while it should always be ready to meet any question confined to it by the constitution it is equally its duty to take care not to involve itself in discussions, which properly belong to other forums. No one has ever doubted the proposition that according to the institutions of this country, the sovereignty in every state resides in the state, and that they may alter, and change their form of government at pleasure. But whether they have changed it or not by abolishing an old government, and by establishing a new one in its place, it is a question to be settled by political power. And when that power has decided, the courts are bound to take notice of its decision and follow it. Political questions are not settled on strict legal principles but rather on political considerations and expediency.[182]

Similar sentiments were expressed by the High Court of Kenya where the Court expressed itself as follows:

The court agrees that the Office of President is a special and unique office, which has immense, and numerous powers and responsibilities. In the court's view these powers and responsibilities are so vast and important that the President must always direct his undivided time and attention to his duties and responsibilities for the sake of protecting the interests of the public. Presidential immunity is the power and authority that a President has to declare that his or her discussions, deliberations and communications are confidential and secret, therefore out of reach of the jurisdiction of the High Court. It is clear that the President is always vested with certain important and unrestricted political powers and in the exercise of such powers the President is to use his own

[182] ibid

> discretion. .. The question therefore is whether all persons charged with duties and responsibilities to carry the express and implied political will of the President are immune from actual judicial review when they are said to be acting not as prescribed by law. There is a view that when acting politically and not as provided for and prescribed by the law all executive appointees' actions can only be examined politically and not legally because their acts are covered and provided for under political question doctrine which states that being political acts they are non justiciable and not reviewable by a court. [183]

The Supreme Court under the Constitution of Kenya 2010 has refused to be constrained by such a limited perspective of procedure culled from such authorities. It has charted a totally new course. The Court's mandate is in the terms of the Constitution, provided in Article 1(1)] that –

> All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

The broad scheme of the Supreme Court's interpretive approach is laid out in the Supreme Court Act, 2011 (Act No. 7 of 2011), section 3(c):

> ….[to] develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth….

And while at it the court noted that it devolves upon itself to signal directions of compliance by State organs, with the principles, values and prescriptions of the

[183] *Republic v Minister for Tourism & another Ex-parte Abdulrahman Rizik & 4 others [*2014] eKLR ,High Court of Kenya at Nairobi Misc Application No 1313 of 2012

Constitution; and as regards the functional machinery of governance which expresses those values, such as devolution and its scheme of financing, it bears the legitimate charge of showing the proper course.[184]

The context and terms of the new Constitution vests in the court the mandate when called upon, to consider and pronounce upon the legality and propriety of all constitutional processes and functions of state organs. The effect is that the Supreme Court's jurisdiction includes resolving any question touching on the mode of discharge of the legislative mandate.[185]

For example, having regard to the "internal procedures" of Parliament the Supreme Court has fallen back on Article 109[186] of the Constitution considering it illogical to argue that as the Standing Orders are recognized by the Constitution, the Court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the "internal procedures" of Parliament. It stated that as a legal and constitutional principle, that Courts

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[184] *Speaker of the Senate & another v Hon. Attorney-General & another & 3 others* [2013] eKLR, Advisory Opinion No 2 of 2013.
[185] Ibid para 54
[186] Article 109, "(1) Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.
"(2) Any Bill may originate in the National Assembly.
"(3) A Bill not concerning county government is considered only in the National Assembly….
"(4) A Bill concerning county government may originate in the National Assembly or the Senate, and is passed in accordance with Articles 110 to 113, 122 and 123 and the Standing Orders of the Houses."

have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation.[187]

This approach is vindicated in comparative regional jurisprudence. The Supreme Court of Zimbabwe, in *Biti & Another v. Minister of Justice, Legal and Parliamentary Affairs and Another*,[188] was called upon to determine the constitutional validity of the General Laws Act, 2002 (Act No. 2 of 2002). It had been claimed that the passing of the said statute was characterized by irregularities that constituted a breach of the Standing Orders as well as the Constitution of Zimbabwe and that, consequently, the statute was unconstitutional. The Court thus held:

> In a constitutional democracy it is the Courts, not Parliament, that determine the lawfulness of actions of bodies, including Parliament….In Smith v. Mutasa it was specifically held that the Judiciary is the guardian of the Constitution and the rights of citizens….[189]

Also relevant was the South African case, *Doctors for Life International v. Speaker of the National Assembly and Others*,[190] where it was held [para.38]:

> …under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution

[187] Supra note 261 at para 55.
[188] (46/02) (2002) ZWSC10
[189] Ibid para 56.
[190] (CCT 12/05) [2006] ZACC 11.

> requires that 'the obligations imposed by it must be fulfilled.' Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations.

On the possibility of the Court intervening in the process of legislation at any of its several stages of enactment, the Court in the *Doctors for Life International* case thus held [para.55]:

> If Parliament and the President allow an unconstitutional law to pass through, they run the risk of having the law set aside and the law-making process commence afresh at great cost.

Is it conceivable that the Court may countermand ongoing legislative processes? This question is answered in the *Doctors for Life* case [para.68]:

> Courts [in the Commonwealth] have traditionally resisted intrusions into the internal procedures of other branches of government. They have done this out of comity and, in particular, out of respect for the principle of separation of powers. But at the same time they have claimed the right as well as the duty to intervene in order to prevent the violation of the Constitution. To reconcile their judicial role to uphold the Constitution, on the one hand, and the need to respect the other branches of government, on the other hand, courts have developed a 'settled practice' or general rule of jurisdiction that governs judicial intervention in the legislative process.

In view of the foregoing, the Supreme Court went on to form the opinion that it makes practical sense that the scope for the Court's intervention in the course

of a running legislative process, should be left to the discretion of the Court, exercised on the basis of the exigency of each case. The relevant considerations may be factors such as: the likelihood of the resulting statute being valid or invalid; the harm that may be occasioned by an invalid statute; the prospects of securing remedy, where invalidity is the outcome; the risk that may attend a possible violation of the Constitution.[191]

From the foregoing analysis it emerges that Kenya's political organs of state bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead privilege or statutory scheme, as a reprieve from that obligation. The Supreme Court recognizes the fact that the Constitution vests executive and legislative authority of the Republic in political arms. Such authority is derived from the people.

It is therefore clear that while the executive and legislative authority lies with the political organs, the same is to be exercised subject to the dictates of the Constitution. They cannot operate besides or outside the four corners of the Constitution.[192]

However, where a question arises as to the interpretation of the Constitution, the Supreme Court, being the apex judicial organ in the land, cannot invoke separation of powers to avoid its constitutional duty. If then the execution of executive or judicial mandates raises conflicts touching on the integrity of the

[191] Supra note 261 at para 60
[192] Ibid at para 62.

Constitution itself, the ultimate judge of "right" and "wrong" in such cases, short of a resolution in plebiscite, is only the judiciary. Call it juristocracy or the counter majoritarian dilemma but that is the import of Article 2.[193]

It may be concluded that the Kenyan judiciary has adopted the supremacist stand because of a marked concern about the breach of constitutional provisions, encouraged by the judicial avoidance of certain issues reflected in the pre Constitution of Kenya 2010 era. Again it may just be that, a court that is mindful of its jurisdiction is likely to resist any attempt to curtail it. Whichever way it is looked at both point to the prospect of a judiciary that will actively intervene national security adjudication whenever it perceives the executive to be exercising its authority in a manner that is violative of the right to access justice.

### 2.9.2.5. Interpretative Limits

Under the Constitution of Kenya 2010, which is law and is binding on government,[194] the practice of judicial review raises questions of the relationship between constitutional interpretation and the Constitution—the law which is construed. The legitimacy of construction by an unelected judiciary in a

[193] (i) "This Constitution is the Supreme law of the Republic and binds all persons and all State organs at both levels of government" [Article 2(1)];
(ii) "No person may claim or exercise State authority except as authorised under this Constitution" [Article 2(2)];and
(iii) "The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ" [Article 2(3)].

[194] Article 2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.
(2) No person may claim or exercise State authority except as authorised under this Constitution.

democratic system becomes an issue whenever the construction is controversial. How the court interprets the Constitution is limited by the constitutional argument or construction that is used by courts in deciding a constitutional issue. Whether an issue is amenable to judicial review or not may turn on the theory of construction adopted.

Theories of constitutional interpretation generally address how the meaning of the Constitution should be discerned, thus allowing the application of substantive constitutional law to a particular set of facts or issues. For instance, there would appear to be some constitutional questions, such as whether a President may run for three full terms of office (he may not),[195] that, because of the clear meaning of the text, do not require the application of a sophisticated theory of constitutional interpretation in order to reach a conclusion.

On the other hand, there are provisions of the Constitution where the text itself is so abstract or ambiguous, such as Article 10(2) on national values and principles of governance,[196] that analysis of information from outside of the constitutional text, such as an examination of the history, structure, purpose, and intent of the relevant provision, is necessary.

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[195] See Article 124 (2)A person shall not hold office as President for more than two terms.
[196] See Article 10 (2) The national values and principles of governance include—
(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
(c) good governance, integrity, transparency and accountability; and
(d) sustainable development

Based on this argument, methods of constitutional analysis that would be appropriate for some provisions of the Constitution may not be necessary or sufficient for others.[197] In fact, some scholars have argued that the formulation of a unified constitutional interpretive theory would obscure external considerations, such as social or political pressures, that might be influential on a court's decision making.[198]

Generally, there appears to be no definitive list of constitutional interpretive theories, nor is there agreement on how such theories should be applied.[199] In practice the positions range from those adherents of strict construction and original intent to those with loose construction and adaptation of text to modern-day conditions.[200] Realistically, this is not an area where the Constitution is

[197] For instance, Professor Richard Fallon has identified five separate tools of constitutional interpretation that judges are likely to use in different combinations: arguments from the plain or historical meaning of the constitutional text; arguments regarding the intent of the framers; doctrinal arguments based on the hypothetical purpose of one or more constitutional provisions; arguments based on judicial precedent; and value arguments based on justice and social policy. Richard H. Fallon Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1189-90 (1987).

[198] See Mark Kelman, Aguide to Critical Legal Studies (Harvard University Press, 1987).

[199] The suggestion has been made, for instance, that the originalist school now includes a number of disparate interpretive theories that, in application, can yield dramatically different legal outcomes. See Thomas B. Colby and Peter J. Smith, Living Originalism, 59 Duke L.J. 239, 253 (2009) (noting that one form of "objective meaning" originalism empowers the judiciary to aggressively protect individual rights from democratic infringement, while other forms would limit the scope of judicial power to interfere with the decisions of democratically elected decision makers).

[200] 647 E.g., Meese, The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention, 45 PUB. ADMIN. REV.701 (1985); Addresses—Construing the Constitution, 19 U. C. DAVIS L. REV. 1 (1985), containing addresses by Justice Brennan, id. at 2, Justice Stevens, id. at 15, and Attorney General Meese. Id.at 22. See also Rehnquist, The Notion of a Living Constitution, 54 TEX. L. REV. 693 (1976).

prescriptive and much will depend on the personal preferences and value judgment of the judge.

A useful reference point would be in the United States where scholarly writing has identified six forms of constitutional interpretative theories as follows; These are (1) historical, (2) textual, (3) structural, (4) doctrinal, (5) ethical, and (6) prudential.[201] The historical argument is largely, though not exclusively, associated with the theory of original intent or original understanding, under which constitutional and legal interpretation is limited to attempting to discern the original meaning of the words being construed as that meaning is revealed in the intentions of those who created the law or the constitutional provision in question. The textual argument is concerned with whether the judiciary or another organ is bound by the text of the Constitution and the intentions revealed by that language, or whether it may go beyond the four corners of the constitutional document to ascertain the meaning.[202]Using a structural argument, one seeks to infer structural rules from the relationships that the

[201] The six forms, or "modalities" as he refers to them, are drawn from P. Bobbitt, Constitutional Fate—Theory of The Constitution (1982); P. Bobbitt, Constitutional Interpretation (1991). Of course, other scholars may have different categories, but these largely overlap these six forms. E.g., Fallon, A Constructivist Coherence Theory of Constitutional Interpretation, 100 HARV. L. REV.1189 (1987); Post, Theories of Constitutional Interpretation, in Law and the Order of Culture 13-41 (R. Post ed., 1991).

[202] Among the vast writing, see, e.g., R. Bork, The Tempting of America (1990); J. Ely, Democracy and Distrust: A Theory of Judicial Review (1980); L. Tribe & M. Dorf, On Reading the Constitution (1991); H. Wellington, Interpreting the Constitution (1990); Symposium, Constitutional Adjudication and Democratic Theory, 56 N. Y. U. L. REV. 259 (1981); Symposium, Judicial Review and the Constitution—The Text and Beyond, 8 U. DAYTON L. REV. 43 (1983); Symposium, Judicial Review Versus Democracy, 42 OHIO ST. L.J. 1 (1981); Symposium, Democracy and Distrust: Ten Years Later, 77 VA. L. REV. 631 (1991). See also Farber, The Originalism Debate: A Guide for the Perplexed, 49 OHIO ST. L.J. 1085 (1989).

Constitution mandates.[203] Doctrinal arguments proceed from the application of precedents or *stare decisis*. Prudential arguments seek to balance the costs and benefits of a particular rule. Ethical arguments derive rules from those moral commitments of the American values and ethos that are reflected in the Constitution. Whichever choice one makes on interpretation there is bound to be a way in which it circumscribes the outcome of the adjudication process. A choice may be permissive or constrictive with corresponding outcomes.

## 2.10. Conclusion

This Chapter has illustrated that judicial review is not a freestanding doctrine. It has ancient origins that tie it up with doctrines such as rule of law in ensuring observance of constitutional dictates by all. It also reinforces separation of powers and checks and balances when the judiciary is called upon to declare on constitutionality and legality of executive conduct. It's functional nexus positions it to be the judiciary's tool for checking the exercise of power by the political arms and in the process inciting responses from them that adjust and give shape to the doctrine of separation of powers. The judicial role in separation of powers is itself has been shown to be constrained by a discussion of a number of jurisdictional, justiciability and interpretative limits that define its scope.

The common denominator of all the doctrines discussed in this chapter as defining the scope of judicial review is the concept of judicial restraint. In

[203] This mode is most strongly association with C. Black, Structure and Relationship in Constitutional Law (1969).

arbitrating national security controversies a judge is not absolutely free to arrive at any decision but is on the contrary, restrained by pre-established concepts, principles and practices which are binding and ultimately define the scope and decision he arrives at. This chapter has identified such concepts such as jurisdiction, justiciability and 'political question' doctrines [judicial restraints] and has, more significantly explained how they could act as judicial restraints in controversies pitting executive conduct against Human Rights.

The Constitution of Kenya 2010 has also led to a drastic retreat of the political question doctrine and charted a totally new course by adopting a constitutional supremacy stand that political organs bear the obligation to discharge their mandate in accordance with the terms of the Constitution.

The precise degree to which executive acts should be subjected to judicial scrutiny remains a matter of uncertain and shifting opinion because the precise extent of executive authority in matters of national security and significantly the outer margins where such authority intersects with civil liberties are not clear. It is not possible to establish the scope of, justify or criticise judicial review of executive power where the extent of such power is unascertainable. This chapter has set out the factors that establish limits to judicial review. Chapter Three sets out to define and ascertain the extent of executive authority generally. It is expected that an understanding of the scope of judicial review on one hand and executive authority on the other will provide a model for judicial review of the

exercise of executive authority in matters of national security in the chapters that follow.

## CHAPTER THREE

## LIMITS AND REMEDIES: HOW THE JUDICIARY HAS BALANCED HUMAN RIGHTS AND NATIONAL SECURITY CONCERNS.

### 3.1. Introduction

The Constitution of Kenya 2010 ushered in an era of transformation by presenting a paradigm shift in the manner courts should approach judicial review. However, this shift has not been appreciated or has been resisted by many in the Judiciary who still follow the old common law doctrines that limit judicial review to matters of procedure while shying off merits. This is evident in jurisprudence from the High Court where judges have declined to acknowledge this fundamental shift in approach to judicial review.[1]Whereas Articles 23(1), 47 and 165(3) have revised the principles that guide judicial review in Kenya, the judiciary has failed to grasp this shift and is still steeped in common law jurisprudence.

The first part of this Chapter explores Kenyan case law to illustrate resistance by showing that definitive features of common law judicial review remain untouched with concern being restricted to procedure as opposed to merits of the decision. The second part explores case law to illustrate that even tentative but progressive shift of judicial review as contemplated by the Constitution is

[1] For example in the case of *Republic v Public Procurement Administrative Review Board & 2 Others Ex-Parte Seven Seas Technologies Limited*, Misc.Civil Application no 168 of 2014 and *Kevin K.Mwiti& Others v Kenya School of Law & 2 Others*, Petition 377, 395 & JR of 2015. In the two decisions, the courts have insisted that Judicial Review should limit itself to procedure and nothing more.

appreciated by an insignificant minority and largely faces resistance from those schooled under common law doctrines.

The next part theorises on the rights and obligations of the state as a prelude to a case study discussion and analysis of the Security Laws Amendment [SLAA] case. The case illustrates how in one precedent setting case, the High Court struggles to balance individual rights and national security concerns. Having looked at Kenyan practice, the next part compares judicial review limits and remedies that are available to check executive conduct in matters of national security in Canada and South Africa. Canada because it is at the frontline of constitutional review that illustrates the encounter between common law and constitutional principles and South Africa because, their Constitution provided a template on which our Article 24 is founded. In the fourth part the *Security Laws Amendment case* [SLAA] will be analysed to identify considerations that informed its findings, whether there is any discernible constitutional standard applicable and the import of Article 24(1).

### 3.2. Kenyan case law to illustrate post 2010 resistance to constitutional review.

Kenyan courts still largely view judicial review as a common law prerogative whose aim is to ensure that public bodies act within limits of legislation passed by Parliament. This has its origins in the case of *Associated Provincial Picture Houses v Wednesbury Corporation*[2]where the Court held that it could not

[2] [1948] 1 KB 223, [1947] EWCA Civ1.

intervene to overturn the decision of the defendant simply because the court disagreed with it. To have the right to intervene, the court would have to conclude that: in making the decision, the defendant took into account factors that ought not to have been taken into account, or the defendant failed to take into account factors that ought to have been taken into account, or the decision was so unreasonable that no reasonable authority would ever consider imposing it. The court held that the decision did not fall under any of these categories and the claim failed. Kenyan courts in enforcing *Wednesbury* have failed to appreciate that the case was premised on the notion of parliamentary supremacy, separation of powers and institutional competence which is not the case under the Constitution of Kenya 2010.

In *Republic V Commissioner of Customs Services Ex-Parte Africa K-Link International Limited*[3]C.W. Githua J stated that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. It reiterated that once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order

[3] [2012]eKLR

prohibiting its implementation since that would substitute its own decision with that of the Respondent. The judge said …

> the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates…

Six years into the 2010 Constitution Anyara Emukule J held in *Republic v Kenya Revenue Authority Ex Parte Abdalla Brek t/a Al Amry Distributors and 4 Others*[4]that…

> To start with, I wish to state that the purpose of a judicial review court is not to look at the merits of the decision being challenged but at the process through which the decision was made.

In 2015, Odunga J in *Republic v Secretary County Public Board & another Ex parte Hulbai Gedi Abdille*[5]quoting a 2001 case still held that…

> …At this stage it is important to revisit the parameters of judicial review jurisdiction. The said parameters were set out by the Court of Appeal in *Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal №185 of 2001* in which it was held that: "Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a

[4] [2016] eKLR
[5] [2015] eKLR Para 34

> Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.

As recently as 2016, Judge Odunga stated in *Kokebe Kevin Odhiambo &12 others v Council of Legal Education & 4 others*[6]

> it is my view that the decision by the School and the Council to require the petitioners to undertake remedial programme cannot be termed unreasonable. It must be remembered that it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness

In 2015 Olao J in the case of *Virginia Wangari Njenga (Suing as administratix of the Estate of Charles Njenga Mukuna) v Land Registrar, Murang'a & 2 others*[7] quoted the same case when he stated "judicial review is concerned with the decision making process and not with the merits of the decision itself—

[6] [2016] eKLR
[7] [2015] eKLR

[*Municipal Council of Mombasa vs Republic and Umoja Consultants Ltd Civil Appeal No.* 185 of 2001…]"

In the year 2015 also, Korir J in *Republic v Kenyatta University, Vice Chancellor— Kenyatta University & 5 others Ex-Parte Elena Doudolado v Korir*[8]while quoting a pre 2010 case *Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300* held that

> the purpose of judicial review is to ensure fairness to those who appear before public authorities. Judicial review is different from an appeal as an appellate court looks into the merits of a decision whereas judicial review is only interested in the legality, rationality and propriety of the process through which the decision was reached.

The same judge again in *Kenya Power & Lighting Company Ltd & another* stated…

> it is clear that a judicial review court does not consider the merits of the decision of a tribunal or public body. Any person dissatisfied with the merits of the decision of a tribunal or public body ought to file an appeal where an appeal is provided for.

The above cases are all evidence that Kenyan judges schooled in common law doctrine have so far not been able to appreciate the impact which constitutionalization of judicial review in Articles 23, 47 and 165 has come to have on judicial review and continue to apply the discredited principles of *Wednesbury*. Given that Wednesbury operates in a parliamentary supremacy regime, courts are unlikely to challenge the substantive provisions of a statute

[8] [2015] eKLR Paras 26–27s

and will regularly, citing separation of powers and institutional competence give way to the executive in matters of national security. The approach fails to appreciate that under the Constitution of Kenya 2010 the courts are now enjoined to operate in a constitutional supremacy regime.

### 3.3. Kenyan case law to illustrate tentative but progressive change.

Under Articles 23, 47 and 165 (b)(d) judicial review of executive conduct should be guided by constitutional principles and not common law. These articles suggest that a court is to look at the merits of a decision by considering its compliance with substantive constitutional principles including the Bill of Rights because the basis of judicial review under the Constitution is now protection of Human Rights and freedoms which demands consideration of the merits of a decision by the executive.

A few emerging authorities that follow have made tentative steps towards appreciating the demise of *Wednesbury* and the central role which the Constitution now has in all judicial review matters.

In *Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board*[9]Justice Onguto signified a shift but without solid recommendation for change when he observed as follows:

> It may sound like stretching the precincts of traditional judicial review, but clearly by the Constitution providing for a "reasonable" administrative action and also enjoining decision makers to provide reasons, the

[9] [2016] eKLR

> constitutional scheme was to entrench the blazing trend where courts were already going into merits of decisions by innovatively applying such principles like proportionality and legitimate expectation. I must however confess that the line appears pretty thin and, perhaps, more discourse is required on the subject of traditional judicial review and the now entrenched substantive constitutional judicial review.

Another case which raised the matter of constitutionalization of judicial review and its consequences for *Wednesbury* was *Masai Mara (SOPA) Limited v Narok County Government*[10]wherein the court stated at para 54:

> I must hasten to point out that since the promulgation of the Constitution in 2010, administrative law actions and remedies were also subsumed in the Constitution. This can be seen in the eyes of Article 47 which forms part of the Bill of Rights. It is safe to state that there is now substantive constitutional judicial review when one reads Article 47 as to the right to fair administrative action alongside Article 23(3) which confers jurisdiction, on the court hearing an application for redress of a denial or violation of a right or freedom in the Bill of Rights, to grant by way of relief an order for judicial review…

The effect of constitutionalization of judicial review has also caught the attention of the eminent Kenyan academic James Thuo Gathii who advises against parallel approaches to judicial review [common law and constitutional] but rather adoption of the model conceived by the Constitution:

> The Kenyan judiciary must guard against the development of a two-tracked system of judicial review. One that looks like the old cases influenced by the common law, on the one hand, and cases that are decided under the 2010 Constitution's principles of judicial review [on the

[10] [2016] eKLR

> other]. Those two tracks are likely to undermine the establishment of a vibrant tradition of judicial review as required by the 2010 Constitution.[11]

In concluding this part, it is apparent that the Constitution sets out the objectives, values and principles that should inform Kenyan laws, and such values should, without doubt override common law principles applicable to judicial review. Article 20 (3) of the Constitution also demands that judges develop the law to give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. The import of this Article is that the Constitution takes centre-stage in application of statutory or common law rules in adjudication of disputes. In principle therefor, where common law rules in judicial review fall short of constitutional principles, the latter should prevail and courts are called upon to develop them to the extent of the shortfall.

The part that follows is an analysis of how, presented with transformative constitutional principles and long-established common-law doctrines on opposing sides, courts could manoeuvre their way to balance constitutional principles and executive conduct largely founded on common law doctrine originating from Parliamentary supremacy.

[11] "The Incomplete Transformation of Judicial Review," A Paper presented at the Annual Judges' Conference 2014: Judicial Review in Transformative Constitutions: The Case of the Kenya Constitution, 2010, Safari Park Hotel, August 19, 2014.

### 3.4. Balancing Rights through judicial review under the Constitution.

Notwithstanding a Bench and Bar schooled in common law doctrines, Article 24 of the Constitution provides a general pointer to how the judiciary can migrate from procedural to merits review in considering the constitutionality of a limitation on fundamental rights. The Article provides that if such limitation is to avail then it must be reasonable and justifiable in a free and democratic society, and that all relevant factors are taken into account, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to balance the rights and freedoms of an individual against the rights of others, and the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose.

At a more practical level, the challenge of balancing constitutional principles and the common law has played out more poignantly since the Kenya Defence Forces (KDF) launched an offensive into Somalia in October 2011 leading to a noticeable upsurge in acts of violence and terror. This state of affairs has thrown up many legal questions and caused a rethinking of accepted common law principles. On the legislative front it resulted in the enactment of sweeping counter terrorism laws known as the *Security Laws (Amendment) Act No. 19 of 2014* (SLAA). SLAA was enacted by the National Assembly on 18th December 2014 and received presidential assent on 19th December 2014. It came into force on 22nd December 2014. It amended the provisions of twenty two other Acts of Parliament concerned with matters of national security.

These laws created tension between constitutionally enshrined rights and liberties, on the one hand, and new measures created to prevent acts of terrorism, on the other.[12]The fundamental question arising in these laws was: how should the state protect its citizens, on the one hand, and allow them full entitlements of their Human Rights and the law, on the other? Put differently, how should the state balance the basic democratic rights of the people but simultaneously maintain and ensure security from terrorism for the people and the state itself? Should the executive in ensuring national security be allowed to restrict and limit fundamental rights in an effort to protect the public? It is the purpose of the remaining part of this chapter to evaluate these questions and to add to the continuous debate regarding the search for a balance between human rights and national security.

Theoretically, it is a fundamental purpose of a state to protect the well-being of its citizens and to ensure a specific expression of freedom, while not harming the wider society.[13] But the Kenyan state is also confronted by the legal paradox mentioned above. How should the state ensure and protect the general public and itself against terrorism, but still be flexible enough to ensure a true and

[12] The most publicised anti-terror laws have been enacted in the USA and UK. The USA PATRIOT Act is an Act of Congress that was signed into law by President George W. Bush on October 26, 2001. It is titled as an Act to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes.
[13]See Article 12. (1) Every citizen is entitled to—
(a) the rights, privileges and benefits of citizenship, subject to the limits provided or permitted by this Constitution;

democratic government in which various universally accepted human rights and freedoms are protected and promoted?

Under the Constitution, it is reiterated that Kenya has a multiparty democratic form of governance founded on, *inter alia*, the values of human rights, transparency and accountability.[14] The open society conceived by the Constitution is under threat because of national and international acts of terrorism and violence that exploit it to cause harm.

The section that follows first identifies and discusses constitutional and judicial justifications for encroachment on human rights and second, identifies select laws that encroach upon human rights and civil liberties and conducts a critical examination of those laws to determine whether the encroachments are appropriately justified under Article 24 of the Constitution, judicial precedent and third, discusses justifications for limits on rights at a general level.

### 3.5. Article 24: Justifying limits on rights and freedoms.

Laws that interfere with human rights and freedoms are sometimes

[14]Article 4. (2) The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10.
Article 10 (2) The national values and principles of governance include—
(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
(c) good governance, integrity, transparency and accountability;

considered necessary so that the mere fact of interference does not suffice as a ground of criticism. There are a number of reasons providing justification for this.

First, rights often clash with one another, so that one has to necessarily give way, even if partially, to another. Freedom of movement, for example, does not give a person unfettered access to another person's private property. Second, individual rights and freedoms will also sometimes clash with a broader public interest—such as public safety or national security when under circumstances to be determined by balancing, one interest has to give way to the other. Accordingly, it is appreciated that there are, of necessity, reasonable limits even to fundamental rights. Only a handful of rights under Article 25 of the Constitution are considered to be absolute.[15]

This trend is reflected in the limitations provisions in the Bill of Rights at Article 24[16] and in international human rights covenants and related guidelines, such

[15] Article 25 expressly provides that the rights set out therein shall not be limited. It states as follows:

> Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—
> (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
> (b) freedom from slavery or servitude;
> (c) the right to a fair trial; and
> (d) the right to an order of habeas corpus.

[16] Article 24 is in the following terms:

> 24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
> (a) the nature of the right or fundamental freedom;
> (b) the importance of the purpose of the limitation;

as the *'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights'*.[17]In paragraph 205 of the SLAA judgment, the court in considering the constitutionality of the impugned provisions of the Act did so against certain constitutional and judicial principles.

Nevertheless, much of the value of the rights and freedoms in the Bill of Rights is lost if the right is too easily qualified or diluted, and such rights and freedoms should therefore not lightly be encroached upon by limitations. Whereas law, of necessity encroaches on a provision of the Bill of Rights, such encroachments should be justified. 'Human rights enjoy a prima facie, presumptive inviolability, and will often 'trump' other public goods'. Louis Henkin wrote in *The Age of Rights*:

> Government may not do some things, and must do others, even though the authorities are persuaded that it is in the society's interest (and perhaps even in the individual's own interest) to do otherwise; individual human rights cannot be sacrificed even for the good of the greater number, even for the general good of all. But if human rights do not bow lightly to public concerns, they may be sacrificed if countervailing societal interests are important enough, in particular circumstances, for limited times and purposes, to the extent strictly necessary.[18]

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(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

[17] United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

[18]Henkin, Louis The Age of Rights (Columbia University Press, 1990) 4.

An analysis of Articles 23, 24 and 25 will of necessity involve two related but contending values. The first value is that people are entitled to certain rights and freedoms that are outside the controlling power of the State and others in the society which when infringed could trigger judicial intervention. The second value is that limitations can be imposed on certain rights and freedoms if the limitations further certain overriding public objectives.[19]Among those objectives pertinent to this thesis is national security.

The foregoing discussion has identified the interests that courts seek to balance: individual rights versus government restrictions on those rights. In that discussion the question of "what" courts are called upon to balance has been answered. The next question is "how" this balancing is actually implemented. To answer this question an inquiry is conducted into the methods that courts adopt in carrying out the balancing act. Different constitutional jurisdictions use different balancing methods. The starting point would be to understand the precise meaning of "balancing".

### 3.6. What is balancing?

Balancing means the 'head to head' comparison of competing rights, values or interests.[20]0ften, the Constitution is central to how courts carry out this

[19] David Dyzenhaus, Murray Hunt & Michael Taggart: "The Principle of Legality in Administrative Law: Internationalization as Constilutionalization" (200 I) 1 OUCLJ 5 at 6 (describing the culture of justification as one which obliges decision-makers "to justify their decisions by showing either how the decisions conform to [some values, including those expressive of human rights], or that they are justifiable departures from those values.").
[20]Alienikoff, Alexander T, Constitutional Law in the Age of Balancing (1987) 96 YLJ 943.

balancing exercise. In terms of Article 23(3), once a right or liberty is enshrined in the Constitution, the state or person seeking to limit it has to justify the infringement of the right by applying the right's limitations under Article 23(1), inter alia the proportionality test. Within the proportionality test, balancing has to be done according to the law of balancing, which means openly and traceably. This burdens the state with the duty to give reasons for the limitations, instead of burdening the people with the duty to justify exercising their rights, and thus prevents judicial arbitrariness.

While in some jurisdictions courts have guidelines for carrying out this duty, in others they have been called upon to develop those guidelines themselves. The part that follows is an account of constitutional and judicial practices of two countries –Canada and the Republic of South Africa, to illustrate a significant divergence in methodology in this regard. Canada because it is the first country that has actively implemented the proportionality test through balancing and the Republic of South Africa because of the unique similarities between their Bill of Rights and the Kenyan Bill of Rights and its mission to be a transformative constitution. After analyzing the principal pillars of the two systems and their differences, this work will use them as standards to examine what similar or distinct methods, if any, Kenyan courts apply.

### 3.6.1. The Canadian Experience.

Section 1 of the Canadian Charter of Rights and Freedoms confirms that the rights listed in the Charter are guaranteed. The section is also known as the

reasonable limits clause or limitations clause, as it legally allows the government to limit an individual's Charter rights.

Under the heading of "Guarantee of Rights and Freedoms", the section states:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Whether or not the limitation was "prescribed by" was stated to relate to a situation where the limitation was the result of government conduct and whether such conduct was authorized by accessible and intelligible law. The Court held that the authorization would fail for being too vague "where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances".[21]

The limitation will also fail where there is no lawful basis for the conduct. In *Little Sisters Book and Art Emporium v. Canada*,[22] the Supreme Court found that the conduct of a border official in singling out homosexual from heterosexual reading

[21] *The Attorney General of Quebec v Irwin Toy Limited* [1989] 1 S.C.R. 927
[22] *Little Sisters Book and Art Emporium, B.C. Civil Liberties Association, James Eaton Deva and Guy Allen Bruce Smythe v The Minister of Justice and Attorney General of Canada, the Minister of National Revenue and the Attorney General of British Columbia* [2000] 2 S.C.R. 1120, 2000 SCC 69 (CanLII)

materials was not authorized by any law. Likewise, police conduct that was not exercised under lawful authority will fail at this stage.[23]

The Canadian reasonable limitations test to determine if the purpose is demonstrably justifiable in a free and democratic society was first set out in *R v Oakes*.[24]Chief Justice Dickson elaborated on the standard when one David Oakes was accused of selling narcotics. Dickson for a unanimous Court found that David Oakes' rights had been violated because he had been presumed guilty. This violation was not justified under the second step of the two-step process:

1.There must be a pressing and substantial objective

2.The means must be proportional

a. The means must be rationally connected to the objective

b. There must be minimal impairment of rights

c. There must be proportionality between the infringement and objective

Because the test is heavily founded in factual analysis strict adherence is not always practiced. If the legislation fails any of the above branches, it is unconstitutional. Otherwise the impugned law passes the *Oakes* test and remains valid. The test is applied once the claimant has proven that one of the

[23] See, for example, *R. v. Therens*, [1985] 1 S.C.R. 613 an early Supreme Court of Canada decision on an accused's right to retain and instruct counsel without delay under section 10(b) of the Canadian Charter of Rights and Freedoms. The Court held that section 235(1) of the Criminal Code, which allowed a police officer to demand a breathalyzer test, violated the accused's right to retain counsel. *R. v. Hebert*,[1990] 2 S.C.R. 151 is the leading Supreme Court of Canada decision on an accused's right to silence under section seven of the Canadian Charter of Rights and Freedoms.

[24] (1986) ISCR 103.

provisions of the Charter has been violated. The burden is on the government to pass the *Oakes* test. This test was set out more concisely in *R. v. Chaulk*[25]also dealing with the presumption of innocence in criminal cases.

On the question whether s. 16(4) is a reasonable limit under s. 1 of the Charter, the court observed:

> There is no question that the presumption of innocence, guaranteed by s. 11(d) of the Charter, is a fundamental legal right which plays a very important role in our criminal justice system. ….However, like the other rights and freedoms guaranteed by the Charter, it is subject to limitations under s. 1 of the Charter. The procedure to be followed when the state is attempting to justify a limit on a right or freedom under s. 1 was set out by this Court in Oakes, supra:
>
> 1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> 2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:

[25]*Robert Matthew Chaulk and Francis Darren Morrissette v. Her Majesty The Queen* [1990] 3 S.C.R. 1303. This is a leading decision of the Supreme Court of Canada on the interpretation and constitutionality of section 16(4) of the Criminal Code which provides for a mental disorder defence [whether s. 16(4) of the Criminal Code, which provides that "Everyone shall, until the contrary is proved, be presumed to be and to have been sane", infringes the presumption of innocence guaranteed in s. 11(d) of the Canadian Charter of Rights and Freedoms and if so, it is justifiable under s. 1 of the Charter]. Two accused individuals challenged the section as a violation of their right to the presumption of innocence under section 11(d) of the Charter of Rights and Freedoms. The Court upheld the section and provided a basis on which to interpret the section.

(a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;

(b) impair the right or freedom in question as "little as possible"; and

(c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

### 3.6.1.1 Pressing and substantial objective

This step asks whether the objective in limiting the protected right is a pressing and substantial objective according to the values of a free and democratic society. In practice, judges have recognized many objectives as sufficient, with the exception of objectives which are in and of themselves discriminatory or antagonistic to fundamental freedoms, or objectives inconsistent with the proper division of powers.[26] In *Vriend v. Alberta*,[27] it was found that a government action

[26]See *Her Majesty The Queen in Right of Canada v. Big M Drug Mart Ltd*. [1985] 1 S.C.R. 295,is a landmark decision by Supreme Court of Canada where the Court struck down the Lord's Day Act for violating section 2 of the Canadian Charter of Rights and Freedoms. This case had many firsts in constitutional law including being the first to interpret section 2. Facts were that on Sunday, May 30, 1982 the Calgary store Big M Drug Mart was charged with unlawfully carrying on the sale of goods on a Sunday contrary to the Lord's Day Act of 1906. At trial the store was acquitted and an appeal was dismissed by the Alberta Court of Appeal.
The constitutional issue before the Court was whether the Act infringed the right to freedom of conscience and religion, if so, whether it is justified under section 1 of the Charter, and whether the Act was intra vires (within) Parliament's criminal power under section 91(27) of the Constitution Act, 1867. The Supreme Court ruled that the statute was an unconstitutional violation of section 2 of The Canadian Charter of Rights and Freedoms, deciding that there was no true secular basis for the legislation and its only purpose was, in effect, to establish a state religious-based requirement, and was therefore invalid.

[27] [1998] 1 S.C.R. 493 is an important Supreme Court of Canada case that determined that a legislative omission can be the subject of a Charter violation. The case involved a dismissal of a teacher because of his sexual orientation. The court found in favour of *Vriend* as the exclusion of sexual orientation as a protected ground of discrimination from ss. 7(1), 8(1) and 10 of the Individual's Rights Protection Act (IRPA) violates s. 15(1) of the Charter and could not be saved under section 1.

may also be invalidated at this stage if there is no objective at all, but rather just an excuse. The court found that the government had chosen not to protect people of the petitioner's sexual orientation because the predicament was considered rare and obscure. The Court ruled this was an insufficient objective, because it was more of an explanation than an objective.

### 3.6.1.2. Rational connection

This step asks whether the legislation's limitation of the right has a rational connection to Parliament's objective. The means used must be carefully designed to achieve the objective. They must not be arbitrary, unfair, or based on irrational considerations. An example of the rational connection test being failed can be found in *R. v. Morgentaler*[28], in which Dickson was of the opinion that laws against abortion should be struck down partly because of a breach of health rights under section 7 and an irrational connection between the objective (protecting the fetus and the pregnant woman's health), and the process by which therapeutic abortions were granted. This process was considered unfair to pregnant women requiring therapeutic abortions, because committees meant to approve abortions were not formed or took too long.

[28] *Dr Henry Morgentaler, Dr Leslie Frank Smoling and Dr Robert Scott v Her Majesty The Queen* [1988] 1 S.C.R. 30. This was a decision of the Supreme Court of Canada which held that the abortion provision in the Criminal Code was unconstitutional, as it violated a woman's right under section 7 of the Canadian Charter of Rights and Freedoms to security of person. Since this ruling, there have been no criminal laws regulating abortion in Canada.

### 3.6.1.3 Minimal impairment

This step had been considered the most important of the steps and is the test that is failed the most.[29] Typically, outright bans will be difficult to prove as minimally impairing.[30] However, the means does not necessarily have to be the absolute least intrusive; this is indeed one of the steps of the test that has been modified. In *Oakes*, the step was phrased to require the limit as being "as little as possible". In *R. v. Edwards Books and Art*[31], this was changed to "as little as is reasonably possible," thus allowing for more realistic expectations for governments.

The inquiry focuses on balance of alternatives. In *Ford v. Quebec,*[32] it was found that Quebec laws requiring the exclusive use of French on signs limited free speech. While the law had a sufficient objective of protecting the French language, it was nevertheless unconstitutional because the legislature could

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[29] Hogg, Peter W. Constitutional Law of Canada. 2003 Student Ed. Scarborough, Ontario: Thomson Canada Limited, 2003, pages 809-810.
[30] see for example RJR - *MacDonald v. Canada* [1995] 3 S.C.R. 199 is a leading Canadian constitutional decision of the Supreme Court of Canada where the Court upheld the federal Tobacco Products Control Act, but struck out the provisions which prevented tobacco advertising and unattributed health warnings and *Ramsden v. Peterborough*[1993] 2 SCR 1084 This was a leading Supreme Court of Canada decision where the Court struck down a bylaw prohibiting all postering on public property on the grounds that it violated freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms. (1993)
[31] [1986] 2 S.C.R. 713 is a leading Supreme Court of Canada decision on the constitutional validity of an Ontario provincial Sunday closing law. The Court found that the legislation was within the power of the province to legislate but it was in violation of the right to freedom of religion under section 2(a) of the Canadian Charter of Rights and Freedoms. However, it could be saved under section 1.
[32] [1988] 2 S.C.R. 712 is a landmark Supreme Court of Canada decision in which the Court struck down part of the Charter of the French Language, commonly known as Bill 101 which had restricted the use of commercial signs written in languages other than French. The court ruled that Bill 101 violated the freedom of expression as guaranteed in the Canadian Charter of Rights and Freedoms.

have accepted a more benign alternative such as signs including smaller English words in addition to larger French words.

#### 3.6.1.4 Proportionality

This step asks whether the objective is proportional to the effect of the law. Are the measures that are responsible for limiting the Charter right proportional to the objective? Does the benefit to be derived from the legislation outweigh the seriousness of the infringement? The legislation may not produce effects of such severity so as to make the impairment unjustifiable. Professor Hogg has argued that merely satisfying the first three criteria of the Oakes test probably amounts to automatic satisfaction of the fourth criterion.[33]

#### 3.6.1.5 Criticism

The Charter has been criticized for widening the scope of judicial review and therefore increasing judicial power. Section 1 is perceived as part of the problem. In their book *The Charter Revolution & the Court Party*, Alberta politician Ted Morton and Professor Rainer Knopff allege judges have a greater role and more choice in shaping policy, and quote former Chief Justice Antonio Lamer as stating that a Charter case, "especially when one has to look at Section 1… is asking us to make essentially what used to be a political call."[34]

[33] Hogg supra note 50 at pages 816-817
[34] Morton, F.L. and Rainer Knopff. The Charter Revolution & the Court Party. Toronto: Broadview Press, 2000, page 52.

At one point Morton and Knopff also criticize the growing power of Supreme Court clerks by alleging that Dickson's clerk Joel Bakan was the true author of the Oakes test. Morton and Knopff write,

> Dickson, it is said, was dissatisfied with the section 1 portion of a draft judgment. He gave the draft to Bakan and asked him to rework the reasonable limitations section. Sensing a long night, Bakan armed himself with a bottle of sherry and set about constructing the now famous three prong balancing test.

Bakan was supposedly influenced by US case law, which Morton and Knopff write should disappoint "Those who praise the section 1/Oakes Test as a distinctively Canadian approach to rights litigation." However, Morton and Knopff's source is "anonymous."[35]

### 3.6.2 The South African Experience

Section 36(1) is the limitation clause of the Constitution and it provides as follows:

> (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
>
> (a) the nature of the right;

[35] Morton and Knopff supra, pages 111, 190.

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

This clause functions as a reminder that the rights enshrined in the Constitution are not absolute and may be limited where the restrictions can satisfy the test laid out in the limitation clause. The clause as well tells us that rights may only be limited where and when the stated objective behind the restriction is designed to reinforce the constitutional values of openness, democracy, dignity, equality, and freedom. More significantly, the limitation clause is an attempt to solve the counter majoritarian problem by establishing a test which determines the extent to which democratically elected arms of government may limit entrenched rights and the extent to which the judiciary may override the majoritarian will.

Limitation analysis under the South African Bill of Rights takes place in two stages.[36] The first stage requires the applicant to demonstrate that the enjoyment of a fundamental right has been limited. This demonstration itself is in several

[36] See *S v Zuma & others* 1995 (2) SA 642 (CC), 1995 (1) SACR 568 (CC), 1995 (4) BCLR 401, 414 (CC)('Fundamental rights analysis under IC Chapter 3 'calls for a two-stage approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?'); *S v Makwanyane& another* 1995 (3) SA 391 (CC), 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665, 707 (CC); *Ferreira v Levin NO & others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1, 26 (CC); *S v Mamabolo (E-TV, Business Day, Freedom of Expression Institute Amici Curiae)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) at para 1 ('The first issue was whether the law . . . limited the right to freedom ofexpression vouchsafed by the Constitution. The second is whether the procedure recognised and sanctioned by our law . . . fell foul of the fair trial rights guaranteed by the Constitution. . . . In respect of each of the first two issues, a finding that the law does indeed limit the fundamental rights in the respects contended for, will in turn require an enquiry whether such limitation is nevertheless constitutionally justified.')

parts. It begins with the applicant having to show that the conduct for which he seeks constitutional protection falls within the ambit of a certain constitutional right.[37] If he is able to show that the conduct falls within the ambit of the right,[38] then he must, in addition, show that the conduct he seeks to challenge limits the exercise of the right.[39]

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[37] As the Constitutional Court has repeatedly noted, the Bill of Right's provisions on standing, FC s 38, and the Court's doctrine of objective unconstitutionality, means that the person before the court need not be obliged to show that he or she is the person whose rights have been infringed or threatened with infringement. On the objective theory of unconstitutionality, see *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at paras 28-29. ('On the objective theory of unconstitutionality adopted by this Court a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person'); *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party and Others* 1998 (4) SA 1157 (CC), 1998 (7) BCLR 855 (CC) at para 64 (In re-affirming its commitment to the objective theory of unconstitutionality, the Court wrote that 'the practice that has been urged upon this Court carries with it the distinct danger that Courts may restrict their enquiry into the constitutionality of an Act of Parliament and concentrate on the position of a particular litigant');

[38] See *Matinkinca v Council of State, Ciskei* 1994 (4) SA 472 (Ck), 1994 (1) BCLR 17, 34 (Ck)('[E]stablish[ing] . . . the meaning or contents . . . of the relevant fundamental rights [entails] . . . a value judgment as opposed to a legalistic or positivistic approach.') However, the Constitutional Court is often reluctant to define clearly the ambit of a right, fearing that such an approach to demarcation will bind them, in some future dispute, to an understanding of the right that they had not anticipated and would not endorse but for the existence of some hypothetical precedent. See, for example, *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC), 1996 (5) BCLR 745 (CC), 1996 (1) SACR 587 (CC) at para 94 ('The less we say meanwhile, in short, the better that will be in the long run.')

[39] There is, of course, an important distinction to be made between law or conduct that limits expressly or intentionally a fundamental right and law or conduct that has the unintended consequence of limiting a fundamental right. See, eg, *Irwin Toy Ltd v Quebec (Attorney General)* (1989) 58 DLR (4th) 577 (Sets out different tests for government actions which intentionally restrict the protected activity and government actions which effectively restrict the protected activity); *Secretary of State of Maryland v J H Munson Co* 467 US 947 (1984)(Law – backed up by the threat of criminal sanction – may intimidate individuals into not engaging in constitutionally protected activity: such law is said to have a 'chilling effect'. For example, the doctrine of overbreadth holds that laws which sweep into their proscriptive reach both constitutionally forbidden activity and constitutionally protected activity are invalid. See *South African National Defense Union v Minister of Defense* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC)('SANDU'). For a discussion of the overbreadth doctrine as articulated in SANDU, see Stu Woolman 'Freedom of Assembly' in S Woolman, T Roux, J Klaaren, A Stein and M Chaskalson (eds) Constitutional Law of South Africa (2nd Edition, OS, March 2006) Chapter 43.

If the court finds that the challenged conduct or law infringes the exercise of the fundamental right, the limitation analysis may move to a second stage.[40] In this second stage, the party attempting to uphold the limitation will attempt to demonstrate that the infringement of a fundamental right is justifiable. This second stage of analysis occurs, not within the context of the fundamental right or freedom, but within the limitation clause.[41] The government however need not litigate this second stage if it believes that the limitation cannot in fact be justified. Prima facie proof of infringement will be sufficient proof of a violation.

If on the other hand, the respondent attempts to justify the limitation, then in terms of section 36(2) he must satisfactorily answer the following question: is the restriction placed on the right reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom? When answering this question the respondent and the court must consider the wording of section 36(1).

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[40] *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (1) SACR 568 (CC), 1995 (4) BCLR 401, 414 (CC)('Fundamental rights analysis under IC Chapter 3 'calls for a two-stage approach. First, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?')

[41] However, the Constitutional Court has made it clear that a failure on the part of the state to defend a limitation of a fundamental right does not relieve the court of the duty to inquire into possible justifications. See *Phillips & another v Director of Public Prosecutions (Witwatersrand Local Division) & others* 2003 (3) SA 345 (CC), 2003 (4) BCLR 357 (CC) at para 20 ('Phillips')('The absence of evidence and argument from the State does not exempt the court from the obligation to conduct the justification analysis'); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('NCGLE I') at paras 33 – 57 (State did not attempt to defend sodomy laws in question, but Court proceeded, at some length, to assess the potential grounds for upholding the laws in the face of the challenge.)

The tests set out below reflect the kinds of questions asked when doing limitation analysis under the Constitution of South Africa.

### 3.6.2.1 Law of General Application.

According to Final Constitution section 36(1), only laws of general application may legitimately limit the rights entrenched in the Bill of Rights.[42] To say that only 'law of general application' may justify the impairment of a fundamental right means that conduct – public or private – that limits a fundamental right and is not sourced in a law of general application cannot be justified in terms of section 36(1).[43]

The foregoing will lead to two kinds of questions with respect to 'law of general application' analysis. The first question is whether there is, in fact, any law that authorizes the challenged conduct. If there is law, secondly, the question will be asked whether the law in question is 'law of general application'. The test for law

[42] The phrase 'law of general application' appears to have been borrowed from the German Basic Law ('GBL'). GBL, article 19(1), reads: 'In so far as a basic right may under this Basic Law be restricted by or pursuant to a law, such law must apply generally and not to an individual case.' The phrase 'law of general application' serves the samepurpose as the phrase 'prescribed by law' does in the Canadian Charter, the European Convention of Human Rights, and the New Zealand Bill of Rights. On the meaning of 'prescribed by law', see Reference re Manitoba Language Rights [1985] 1 SCR 721, 748--9, 19 DLR (4th) 1; *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at para 49; Delmas-Marty (ed) The European Convention for the Protection of Human Rights: International Protection versus National Restrictions (1992) 216 - 217.

[43] *August v Electoral Commission and Others* 1999 (3) SA 1 (CC) at para 23 ('In the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the threatened infringement of prisoners' rights in terms of s 36 of the Constitution as there was no law of general application upon which they could rely to do so.')

of general application will be met by most legislation,[44] subordinate legislation,[45] regulation,[46] municipalby-laws,[47] common law rules,[48] customary law rules,[49] rules of court,[50] and international conventions.[51]

### 3.6.2.2. Reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Section 36 provides a mechanism for the consideration of competing values and interests, and for managing the tension between democracy and rights. The

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[44] See *Mkontwana v Nelson Mandela Metropolitan Municipality & Another; Bissett& Others v Buffalo City Municipality &Others;Transfer Rights Action Campaign & Others v MEC, Local Government And Housing, Gauteng, & Others (Kwazulu-Natal Law Society And Msunduzi Municipality As Amici Curiae)* 2005 (2) BCLR 150 (CC), 2005 (1) SA 530 (CC) at para 83, fn 8 ('Section 118(1) is a provision in an Act of Parliament which governs all municipalities in South Africa. It is clearly a law of general application as contemplated by s 36 of the Constitution.')

[45] *Larbi-Odam and Others v Member Of The Executive Council For Education (North-West Province) and Another* 1997 (12) BCLR 1655 (CC), 1998 (1) SA 745 (CC) at para 27 ('A precondition to the applicability of IC s 33(1) is that the limitation of a right occur "by law of general application". I hold that precondition to be met in this case. Regulation 2(2) is subordinate legislation which applies generally to all educators in South Africa.')

[46] See ibid *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC) at para 27 (Regulation 2(2) of the Regulations regarding the Terms and Conditions of Employment of Educators found to be a law of general application for the purposes of limitations analysis under IC s 33(1).)

[47] See *North Central Local Council & South Central Local Council v Roundabout Outdoor (Pty) Ltd & Others* 2002 (2) SA 625 (D), 2001 (11) BCLR 1109 (D)(Municipal by-law placing restrictions on advertising and signs, and thus limiting rights of expression, found to be a law of general application for purposes of FC s 36.)

[48] See *S v Thebus and Another* 2003 (10) BCLR (CC), 2003 (6) SA 505 (CC) at paras 64 –65 (The Court held that an arrested person had the right to remain silent and drawing an adverse inference on credibility from silence limited the right. It wrote: 'The rule of evidence that the late disclosure of an alibi affected the weight to be placed on the evidence supporting the alibi was one that was well recognised in the common law. As such, it was a law of general application.')

[49] *Nwamitwa v Phillia& Others* 2005 (3) SA 536 (T)(Customary law rules, viewed in toto, constitute law of general application that ultimately justify the tribal authorities refusal to appoint a female chief.)

[50] *Sanford v Haley* No 2004 (3) SA 296 (C)(Suggests that Rules of Court qualify as law of general application); *S v Nocuse& Others* 1995 (1) SACR 510 (C), 1995 (3) SA 240 (Tk)(Rules of court regarding leave to appeal found to be law of general application for purposes of limitations analysis under IC s 33(1)).

[51] *Chief Family Advocate and Another v G* 2003 (2) SA 599 (W)(Noting that in Sonderup, the Constitutional Court found that the Hague Convention on Civil Aspects of International Child Abduction Act 72 of 1996, having been incorporated into domestic law, was a law of general application.)

primary mechanism for doing that is the inquiry into reasonableness and justifiability. The section provides that, for a fundamental-rights limitation to pass scrutiny, it needs to be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The analysis of how section 36 enables us to negotiate these conflicts within the context of a particular dispute would be useful. The section contains a number of pointers in this regard. In the first place, the phrase 'justifiable in an open and democratic society based on human dignity, equality and freedom' suggests that we can find guidance in the laws, practices and judicial interpretations of other constitutional democracies. Secondly, section 36 lists five factors that may assist us in determining the reasonableness and justifiability of a limitation.

In *S v Makwanyane & another*,[52] one of the first cases to be decided by the Constitutional Court, the Court had the following to say about the inquiry into reasonableness and necessity under Interim Constitution section 33:

> The limitation of fundamental rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for an "open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent

[52] 1995 (6) BCLR 665 (CC).

> in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited, and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, "the role of the Court is not to second-guess the wisdom of policy choices made by legislators".[53]

Despite the difference in the wording of sections 33 of the Interim Constitution and section 36 of the Final Constitution, this statement defines, in many respects, the South African Constitutional Court's approach to limitation analysis.[54] The considerations in *Makwanyane*, have with minor alterations, found their way into the text of Final Constitution s 36. The court has also accepted the approach where limitation analysis involves the balancing of conflicting values and an assessment based on proportionality. It has also rejected an 'absolute' or rigid standard in favour of a flexible, context-sensitive form of analysis which is done on a case by case basis. These have become a

[53] Para 149.

[54] The Court stated in *National Coalition for Gay and Lesbian Equality v Minister of Justice & others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) para 33: 'Although section 36(1) of the 1996 Constitution differs in various respects from section 33 of the interim Constitution its application still involves a process, described in *S v Makwanyane and Another* 1995 93) SA 391 (CC), 1995 (6) BCLR (CC) as the "… weighing up of competing values, and ultimately an assessment based on proportionality … which calls for the balancing of different interests."'

recurring theme in the South African Constitutional Court's limitation jurisprudence.[55]

The weighing up of conflicting values that is involved in limitation analysis of necessity involves an analysis of the five factors listed in section 36.

### 3.6.2.3. Nature of the right

The first factor requires consideration of 'nature of the right' that is limited. A possible explanation for this requirement is that it enables the court to rank the right to be limited in order of importance for purposes of analysis. For example, infringements of core rights such as the right to life may require a reviewing court to ensure that (1) the objective the government intends to achieve is so overwhelmingly important that it justifies the infringement of such rights or (2)that the means used to the objective must be no more restrictive of the right than is absolutely necessary or (3) that the benefits to be realized by the objective significantly outweigh the burdens imposed upon the rights-holder. On the converse, with respect to the infringement of non-core rights whose 'nature' makes them less central to the constitutional project – say trade and occupation or residence – the burden on the government or party seeking to uphold the limitation may be lighter.[56]

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[55] Consider, for instance, the statement in *S v Manamela& another* (Director-General of Justice Intervening 3 that a court must 'not adhere mechanically to a sequential check-list', but must 'engage in a balancing exercise and arrive at a global judgment on proportionality'.

[56] This interpretation does makes sense where, as in the final Constitution, express levels of scrutiny do not exist and the courts are required to reach their own conclusions about the relative importance of each right and the kind and the strength of justification the party defending the infringement must offer.

However, the Constitutional Court has rejected the idea that section 36 imports different levels of scrutiny. In *Christian Education*,[57] the Court rejected this formulation, which is based on the 'strict scrutiny' test as applied in the United States. Sachs J pointed out that section 36 does not call for a rigid test based on strict scrutiny. He quoted with approval from the judgment in *S v Manamela*, in which it was said that 'the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list'.

In the Court's opinion, the inquiry into the nature and importance of the right forms part of a larger inquiry that is based on how important the right is to an open and democratic society based on human dignity, equality and freedom, so the more important the right, the more compelling any justification for the limitation of the right needs to be.

#### 2.6.2.4 Importance of the purpose of the limitation

The second factor identified is 'the importance of the purpose of the limitation'. This requirement involves two issues: an identification of the purpose of the limitation, and an appraisal of its importance.

Regarding identification, courts are faced with the challenge that the objective of the limitation often does not appear clearly from the law in question. They have

[57] *Christian Education South Africa v Minister of Education* 2000 (10) BCLR 1051 (CC), 2000 (4) SA 757 (CC) paras 29-31. See also *Prince v President of the Law Society of the Cape of Good Hope* 1998 (80 (8) BCLR 976 (C) para 128.

to construct the objective from the overall purpose of the Act,[58] the legislative history of the provision and the mischief it was intended to address, and/or the historical development of the relevant common-law rule.

Secondly, the court must determine whether the objective being pursued by the government is sufficiently important to justify a restriction of a fundamental right in 'an open and democratic society based upon human dignity, equality and freedom'. At the very least, the objectives of a fundamental-rights limitation must not be inconsistent with the values of an open and democratic society based on human dignity, equality and freedom.[59]

On the other hand, a government objective designed to reinforce the values of the Constitution and fundamental rights would easily pass this leg of the limitation test.[60]

### 3.6.2.5 Nature and extent of the limitation

The next factor, the 'nature and extent of the limitation', is central to the Court's approach, based as it is on 'a balancing exercise' and 'a global judgment on proportionality'.[61] In the words of O'Regan J in *S v Manamela*:[62]

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[58] Bearing in mind, however, that it is the purpose of the impugned provision, and not of the Act, that is in issue. See *Lesapo v North West Agricultural Bank & another* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420 (CC) para 23.

[59] See, in the *Canadian context, R v Big M Drug Mart* [1985] 1 SCR 295 at 351 (compelling the observance of the Christian Sabbath could not justify the limitation of the right to freedom of religion).

[60] At the most basic level those constitutional values include openness, democracy, human dignity, equality and freedom. At a more specific level, the values which justify restriction – and which flow from the individual rights themselves – may include tolerance, cultural diversity, a commitment to representative and participatory politics, social justice, and privacy.

[61] *Manamela* supra.

[62] Para 53.

> The level of justification required to warrant a limitation upon a right depends on the extent of the limitation. The more invasive the infringement, the more powerful the justification must be.

In appraising the nature and extent of a limitation, the Court considers a variety of factors.

First, the court considers whether the limitation affects the core values underlying a particular right. It has, for example, been found that the right to be tried in a hearing presided over by a judicial officer is a core component of the right not to be detained without trial.[63] Similarly, reverse onus provisions are said to strike at the heart of the right to be presumed innocent, and require a clear and convincing justification.[64] By contrast, the prohibition of child pornography was found not to implicate the core values of the right to freedom of expression, as it restricted 'expression of little value which is found on the periphery of the right' and which is 'not protected as part of the freedom of expression in many democratic societies'.[65]

A second inquiry deals with the actual impact of the limitation on those affected by it. For instance, it has been found that the criminalisation of gay sodomy

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[63] *De Lange v Smuts NO & others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 89 (Ackermann J). But see also the observations of Didcott J at para 125.
[64] *Manamela* supra.
[65] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & others* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at para 59. Here, the core of freedom of expression was defined with reference to the judgment in *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC), 1999 (6) BCLR 615 (CC) para 7, in which three values underlying freedom of expression were identified. In that case, the Court stressed the 'instrumental function [of freedom of expression] as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally'.

constituted a severe limitation of a gay man's rights to equality, privacy, dignity and freedom, as it negatively affected 'his ability to achieve self-identification and self-fulfilment'.[66] The Court also held that a provision in terms of which someone found in possession of a certain quantity of cannabis is presumed to be a dealer,[67] or in terms of which someone is presumed to be in possession of arms or ammunition,[68] constituted a serious infringement of the right to be presumed innocent, given the heavy penalties involved and the social disapprobation attached to it.

Thirdly, one of the factors the Court sometimes considers in determining the level of justification is the social position of the individuals or group concerned. Whether or not a limitation targets, or has a disproportionate impact on vulnerable sections of the population, such as religious minorities,[69] the poor,[70] or children born out of wedlock[71] are some of these factors.

Fourth, the Court has also considered whether the limitation is permanent or temporary and whether it amounts to a complete or partial denial of the right in

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[66] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) paras 32,36.
[67] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388, 1995 (12) BCLR 1348 (CC) paras 19, 21.
[68] *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 para 20.
[69] *Prince* supra paras 51 per Ngcobo J, dissenting (describing the stigmatisation suffered by Rastafari as a result of the criminalisation of cannabis) and 157-163 per Sachs J, dissenting (considering the negative impact of the limitation on Rastafari, given that they are a vulnerable and politically powerless group).
[70] *Coetzee v Government of the Republic of South Africa; Matiso& others v Commanding Officer, Port Elizabeth Prison & others* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) paras 8 (Kriegler J), 66, 67 (Sachs J) (persons most vulnerable to imprisonment for judgment debts are the poor and unemployed); *S v Manamela* (supra) para 44 (considering the fact that the reverse onus provision would leave the poor, unskilled and illiterate most vulnerableto erroneous conviction); *Jaftha v Schoeman* (supra) paras 39, 43 (considering the impact of a provision authorising the sale-in-execution of people's homes on the indigent).
[71] *Petersen v Maintenance Officer & others* 2004 (2) SA 56 (C), 2004 (2) BCLR 205 (C) para 22.

question. In *S v Makwanyane*, the Court emphasised the extremity and irrevocability of the death penalty, and cautioned that '[t]here is a difference between encroaching upon rights for the purpose of punishment and destroying them altogether'.[72] On the other hand, the Court found in *Christian Education*[73]that the impact of the prohibition of corporal punishment in schools was not unduly burdensome, as it did not deprive parents of the general right to bring up their children in accordance with Christian beliefs, but merely prevented them from empowering the schools to administer corporal punishment.

The fifth consideration is closely related to the last factor enumerated in section 36(1), namely the existence of less restrictive means. Often, the court asks whether the limitation is narrowly tailored to achieve its objective. First, the Court asks whether the limitation applies to a narrow or broad category of cases.[74] In *S v Mamabolo (E TV & others intervening),*[75] the Court found that the crime of scandalizing the court applied to such a narrow category of cases, that its effect on freedom of expression was minimal. The important public interest in maintaining the integrity of the judiciary, thus easily outweighed the negative effects of the limitation. And in *S v Manamela*,[76] the minority pointed out that

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[72]*Makwanyane* para 143. See also *S v Walters & another* 2002 (4) SA 613 (CC), 2001 (10) BCLR 1088 (Tk) para 27 (statutory authorisation of the killing of a fleeing suspect amounts to 'a complete denial of the right to life and consequently of all other rights which flow from it').
[73] Paras 38, 51.
[74] See, in addition to the cases discussed below, *S v Dlamini; S v Dladla& others; S v Joubert; S v Schietekat*(supra) para 74; *Minister of Home Affairs v NICRO* (supra) para 67 (blanket exclusion of prisoners sentenced to imprisonment without the option of a fine from the right to vote, found to be unjustifiable).
[75] 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC) para 48.
[76] (Supra) paras 70,71.

the reverse onus provision had been narrowly crafted, as it did not apply to stolen goods which were bought at a public market, from a shopkeeper or at an auction.[77]

Second, the Court looks at the width of the discretion and the safeguards that narrow the extent of the limitation. Inter alia, the following considerations come into play: whether legislative guidance is given to administrative officials as to how they should exercise their discretion;[78] whether the limitation of someone's right must be authorised by a judicial officer (e.g. whether a warrant must first be issued);[79] whether the extent of the limitation is limited by carefully tailored exemptions or other safeguards;[80] and whether the exercise of the discretion is subject to review by the courts.[81]

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[77] See also *Metcash Trading Ltd v Commissioner for the South African Revenue Service & another* 2001 (1) SA 1109 (CC), 2001 (1) BCLR 1 (CC) para 54 (limitation of vendor's right to challenge the correctness of an assessment of the tax payable by him/her, is narrowly focused, and does not apply to any other possible challenges).

[78] See the discussion of *Dawood* (supra) in the text below. See also *Mistry* (supra) para 22; *De Reuck* (supra) para 76.

[79] Compare eg the judgment in *Dawood* (supra) with that in *Hyundai* (supra). In *Dawood* para 46, O'Regan J noted that there is 'a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to exercise the discretion in a manner consistent with the provisions of the Bill of Rights. Officials are often extremely busy and have to respond quickly and efficiently to many requests or applications. The nature of their work does not permit considered reflection on the scope of constitutional rights or the circumstances in which a limitation of such rights is justifiable.' See also *Mistry* (supra) paras 21, 22 (power of medical inspectors to enter any place without having to obtain a warrant, found to be unreasonable);

[80] In *Coetzee* (supra), the Court noted the lack of adequate procedural safeguards to prevent the imprisonment of judgment debtors who are unable to pay (paras 14 (Kriegler J) 23, 25 (Didcott J)).

[81] See *Metcash Trading* (supra) where the Court based its finding on a number of factors, one of them being that the temporary limitation of a taxpayer's right to challenge the correctness of an assessment made by the Commissioner, was ameliorated by the Commissioner's power to suspend the operation of the 'pay now, argue later' principle in appropriate cases. Moreover, the exercise of this discretion constituted administrative action which was subject to review by

### 3.6.2.6 Whether a less restrictive means to achieve the purpose exists

A limitation should be carefully tailored to achieve its purpose, it should be narrowly focused and not too wide, misdirected or overbroad.[82]The rationale behind this is that if the government (or some other party) is going to restrict the exercise of a fundamental right in the service of some other compelling concern, then it should attempt to employ means of doing so which are least restrictive of the right(s) being infringed.

Less restrictive means have been found to exist in a number of cases where government failed to demonstrate that the same purpose could not be achieved by means of a provision applying to a narrower range of activities, persons or objects.[83] For instance, it was held in *Coetzee*[84] that provisions which authorised the imprisonment of judgment debtors, were overboard in that they applied not only to debtors who willfully refused to pay, but also to those who were unable to pay. In *Case & another v Minister of Safety and Security & others; Curtis v*

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the courts.(paras 42, 62) . However, the mere fact that the exercise of a discretion may be challenged on administrative grounds, does not necessarily point to the conclusion that the limitation is narrowly tailored. See *Dawood* (supra) para 48.

[82] Judgments in which a limitation was described as 'overbroad', include *Coetzee v Comitis& others* 2001 (4) BCLR 323 (C) (supra) paras 13, 14 and 32; and Case & another v Minister of Safety and Security & others; 1996 (5) BCLR 609 (CC) paras 48-63 (Mokgoro J), 91, 93 (Didcott J), 97 (Langa J) and 108-112 (Sachs J) paras 48-63, 93, 97 and 108-112.

[83]*Makinana& others v Minister of Home Affairs & another; Keelty& another v Minister of Home Affairs & another* 2001 (6) BCLR 581 (C) 607A-D (protection of employment opportunities of South African citizens and permanent residents could be achieved through a provision which did not apply to foreign spouses of South African permanent residents); *Prince v President of the Law Society of the Cape of Good Hope & others* 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC) para 54-76, 81 (finding of Ngcobo J (dissenting) that a religious exemption could be granted from the ban on cannabis without undermining the purpose of the provision; but see also the majority judgment at para 129-142).

[84] (Supra) paras 13, 14 (Kriegler J), 32 (Langa J).

*Minister of Safety and Security & others*[85] a ban on the possession of any indecent or obscene photographic matter was found to be unreasonable, as the definition of indecent or obscene matter was so broad that it could apply to almost any photograph, film or television programme which contained references to sexual matters.

### 3.7. Security Laws (Amendment) Act and the decision in *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others.*

The *Security Laws (Amendment) Act No 19 of 2014* (SLAA) was enacted following two attacks on civilians in Mandera County for which the militant Islamist Somali-based group Al-Shabaab claimed responsibility. On November 21, attackers stopped a Nairobi-bound bus and killed 28 passengers who could not recite an Islamic creed.[86] On December 1, Al-Shabaab fighters raided a quarry in Mandera and killed 36 people,[87] again apparently selecting victims on the basis of religion.

The Act amended the provisions of the following Acts of Parliament concerned with matters of national security: the Public Order Act (Cap 56) the Penal Code (Cap 63), the Extradition (Contagious and Foreign Countries) Act (Cap 76), the Criminal Procedure Code (Cap 75), the Registration of Persons Act (Cap 107), the Evidence Act (Cap 80), the Prisons Act (Cap 90), the Firearms Act (Cap 114), the

[85] 1996 (5) BCLR 609 (CC) paras 48-63 (Mokgoro J), 91, 93 (Didcott J), 97 (Langa J) and 108-112 (Sachs J).
[86] Daily Nation, 22nd November 2014.
[87] Daily Nation, 2nd December 2014.

Radiation Protection Act (Cap 243), the Rent Restriction Act (Cap296), the Kenya Airports Authority Act (Cap 395), the Traffic Act (Cap 403), the Investment Promotion Act (Cap 485B), the Labour Institutions Act of 2007, the National Transport Safety Authority Act, Refugee Act No.13 of 2006, the National Intelligence Service Act No. 28 of 2012, the Prevention of Terrorism Act No. 30 of 2012, the Kenya Citizenship and Immigration Act (Cap 172), the National Police Service Act (Cap 84) and the Civil Aviation Act No. 21 of 2013. It is these extensive, controversial and substantial amendments that precipitated the petition that followed.[88] The petition challenged the constitutionality of SLAA and asked the court to determine four fundamental questions related to the process of the enactment of SLAA as well as its contents.

The first question concerned the extent to which the court may inquire into the processes of the legislative arm of government and in particular, whether the court can interrogate parliamentary proceedings. The second question concerned the nature and scope of the constitutional obligation of the legislature to facilitate public involvement and participation in its legislative processes, and the consequences of the failure to comply with that obligation. The third question was whether the amendments to various Acts of Parliament contained in SLAA which were impugned by the petitioners limited or violated the Bill of Rights or were otherwise inconsistent with the Constitution of Kenya. Should the court find such limitation, violation or inconsistency, then it must determine whether

[88] Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others [2015] eKLR

the limitation is justifiable in a free and democratic society. Pertinent to this thesis the court found as follows:

i. The Court is bound by the doctrine of avoidance but it does not apply in the present circumstances. It has jurisdiction to determine the question whether any law is inconsistent with or in contravention of the Constitution.

ii. The doctrine of separation of powers does not prevent the Court from examining whether the acts of the Legislature and the Executive are inconsistent with the Constitution as the Constitution is the supreme law.

iii. Section 64 of SLAA which introduced Sections 30A and 30F to the Prevention of Terrorism Act are unconstitutional for violating the freedom of expression and the media guaranteed under Articles 33 and 34 of the Constitution.

Generally, the Security Laws (Amendment) Act No 19 of 2014 provided a powerful tool to the state in its obligation to combat terrorism and to protect the well-being of its citizens and their property. Although various safeguards were included in the Act, some of these measures surpassed certain rights protected under the Constitution and the Bill of Rights in particular. Although the scope of this thesis does not allow for an in-depth and comprehensive discussion of all possible conflicts of interest between the Act and the Constitution, other conflicts highlighted by the decision were as follows:

a. The right to freedom of expression and the right to freedom of the media guaranteed under Articles 33 and 34;

b. The right to privacy under Article 31;

c. The rights of an arrested person under Article 49 and the right to fair trial under Article 50;

d. Entitlement to citizenship and registration of persons under Article 12;

e. The right to freedom of movement under Article 39 and the rights of refugees under Articles 2(5) and 2(6) of the Constitution and International Conventions.

f. Whether the provisions of the Act are unconstitutional for violating the provisions of Article 238 of the Constitution with regard to national security.

### 3.7.1 What informed the court in deciding as it did in SLAA?

Since promulgation of the Constitution of Kenya 2010, the judiciary has moved very slowly and cautiously in developing a limitations doctrine. Despite its lack of clarity on the questions to be answered when doing limitations analysis, there are some signs of an emerging jurisprudence. This section discusses considerations identified in SLAA, what informed the judiciary in deciding as it did on specific claims.

### 3.7.2 Considerations identified in SLAA that informed its findings.

The first consideration is if the limitation is **justifiable**. Under this consideration, it is to be noted that an infringement of a right is not unconstitutional if it is justifiable under the criteria set out in s 24(1). The initial onus rests on the aggrieved petitioner to show that an infringement of a right has taken place. The respondent may then justify the infringement as a proper limitation of rights under Article 24(1). Appropriate evidence must be led by the respondent to justify a limitation of a right. In SLAA the court applied this reasoning and held at paragraph 209 that the State, in demonstrating that the limitation is justifiable, must show that the societal need for the limitation of the right outweighs the individual's right to enjoy the right or freedom in question. At the first stage of the inquiry the scope of the right ought not to be qualified in order to accommodate the exercise of another right.

The second consideration cited and adopted by the court at paragraph 210 was that the limitation be one that is **prescribed by law**. It must be part of a statute, and must be clear and accessible to citizens so that they are clear on what is prohibited. On this the court was guided by the test for determining the justifiability of a rights limitation enunciated by the Supreme Court of Canada in the case of *R vs Oakes*[89]to which CIC referred the Court.

[89]supra

The third consideration cited and adopted by the court is enumerated in paragraph 211 to the effect that the objective of the law must be **pressing and substantial**, that is, it must be important to society. This too was culled from Canadian judicial precedent.

The fourth consideration applied by the court in paragraph 211 is the principle of **proportionality**. It asks the question whether the State, in seeking to achieve its objectives, has chosen a proportionate way to achieve the objectives that it seeks to achieve. In reference to the proportionality requirement of the Oakes test the Court stated that:

> The nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards.

Canadian court examples finding government conduct disproportionate to the alleged benefits include: laws protecting the confidentiality of matrimonial proceedings and restrictions on advertising by dentists. Examples of the Court finding measures proportionate to the benefits include steps taken to prevent drunk-driving in, restriction on publication of sex-assault victim's names and prohibition of picketing outside courthouses.

At paragraph 212 the court was of the view that once a sufficiently important objective for rights limitation has been established, the means chosen to achieve the objective must pass a proportionality test. The implication here is that the means must be rationally connected to the objective sought to be achieved, and must not be arbitrary, unfair or based on irrational considerations. Secondly, the means must limit the right or freedom as little as possible, and their effects on the limitation of rights and freedoms must be proportional to the objectives.

The considerations enumerated above echo the requirements of Article 24 on the manner of considering the constitutionality of a limitation on fundamental rights by requiring that such limitation be reasonable and justifiable in a free and democratic society, and that all relevant factors are taken into account, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to balance the rights and freedoms of an individual against the rights of others, and the relation between the limitation and its purpose, and whether there are less restrictive means to achieve the purpose.

These considerations aside, there are the larger issues first, the absence of any significant limitation analysis or structured justification in the decisions and second a total failure to do rigorous limitation analysis on all rights listed as impacted by enactment of SLAA. This strengthens the contention that Kenyan case law lacks clear judicial standards for justifying limitation of entrenched

rights. The discussion of Canada and The Republic of South Africa above shows that it is insufficient to skirt around the issues in the manner of SLAA and draw a conclusion without laying out the standard by which that conclusion was reached. What the constitution lays out in Article 24(1) are considerations but these are insufficient absent a "criteria for weighing and ranking" the various interests at stake. Such criteria applied properly flesh and give life to the bones of the constitution by importing real life experiences to the text. This lacuna explains why the court identified the considerations listed above but failed to follow up and engage in a rigorous process of weighing and ranking impacted interests. There is therefore an element of reflexivity, arbitrariness and open-ended rationalizations that make it hard identify any discernible analytical pattern.

### 3.8. Is there a Constitutional standard the court should have adopted in SLAA?

The court in SLAA failed to exhibit any significant limitation analysis or structured justification of its findings. This section interrogates Article 24(1) to the extent that it provides clear standards for justifying limitation of rights which could be the foundation of the judgment. It answers the question how the court could have, but did not address itself to the question of constitutionality of the impugned provisions of SLAA.

First, Articles 24(1) and 165(3)(d) have cultivated a new 'culture of justifiability' under which any act or decision of the elected branches that limits a

Constitutional right must be objectively *justifiable*; it must be supported by rational and cogent argument. Second, the Executive branch can no longer rely upon its democratic credentials to justify its conduct. Central to this end is proportionality which allows for more rigorous review of executive conduct.

This section will discuss the environment in which both the Judiciary and the Executive ought now to be operating in as a result of the promulgation of the Constitution of Kenya 2010. The argument advanced is that the Constitution of Kenya 2010 has introduced a new constitutional standard in which any limitation of rights must be objectively justifiable and proportionate.

### 3.8.1. A Culture of Justifiability under Article 24(1).[90]

In a culture of justification, a government is required to "provide substantive justification for all of its actions, in that it must show the rationality and reasonableness of those actions and the tradeoffs they necessarily entail".[91] Justification, or reason-giving, has a certain "pull",[92] in that the authority of decisions that affect legal interests in part depends on the reasons offered in support.

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[90]See SLAA at para. 210 the court stating "We are also guided by the test for determining the justifiability of a rights limitation enunciated by the Supreme Court of Canada in the case of *R vs Oakes (1986) ISCR 103* to which CIC has referred the Court."

[91]Moshe Cohen-Eliya and IddoPorat, Proportionality and Constitutional Culture (Cambridge Univ. Press 2013), at 7.

[92]The term is by David Dyzenhaus and Michael Taggart, "Reasoned Decisions and Legal Theory", in Douglas E. Edlin, ed., Common Law Theory (2007), at 134; see also David Dyzenhaus, "Proportionality and Deference in a Culture of Justification", in Grant Huscroft, Bradley W. Miller and Grégoire Webber, eds., Proportionality and the Rule of Law: Rights, Justification, Reasoning (Cambridge Univ. Press 2014) 234, at 242.

Article 24(1) provides that "A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is *reasonable and justifiable*". Reasonableness and justifiability are central to the adjudication of rights in liberal democracies worldwide.[93] The twin expressions are both principles of constitutional adjudication and procedures for managing such disputes.[94]

But what exactly is the concept of justifiability? Although frequently used by in academic literature by those advocating more stringent judicial review, it is not clear what they mean.[95]The original proponent of a culture of justification was Etienne Mureinik, the South African human rights lawyer who at the end of apartheid wrote of his country's new Constitution:

> It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by

[93]See Aharon Barak, Proportionality: Constitutional Rights and Their Limitations (2012); Alec Stone Sweet & Jud Mathews, Proportionality, Balancing and Global Constitutionalism(2008), 47 Colum. J. Transnat'l L. 73; David Beatty, The Ultimate Rule of Law (2004). Evelyn Ellis, The Principle of Proportionality in the Laws of Europe(1999); WojciechSadurski, Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe(Dordrecht: Springer, 2005).
[94]Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008-2009), 47 Colum. J. Transnat'l L. 72, at 73.
[95]e.g. Richard Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 MLR 859; Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference" in Nicholas Bamforth and Peter Leyland (eds), Public Law in a Multi-Layered Constitution (Hart 2003); Jeffrey Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671.

> government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force of its command.[96]

This provides the founding premise of the culture of justification in Article 24(1). Any exercise of power must be supported with sound reason and not appeals to authority. Mureinik's vision was of a South Africa free from the 'culture of authority'[97] that had sustained the apartheid regime. The "culture of authority" had fostered an "ethic of obedience",[98] a system of government based upon power and coercion.

Locally, departure from a "culture of authority" in South Africa is comparable to the promulgation of the 2010 Constitution since both imposed upon those in power an obligation to justify the actions they took. Fundamental was the Bill of Rights within the 2010 Constitution which proclaims 'standards of justifiability.' Significantly, the Bill of Rights is not absolute because some rights are capable of restriction through the general limitation clause in Article.24 (1) which sets out the conditions upon which restrictions of a right can be justified.[99] A restriction must be 'reasonable and justifiable in an open and democratic society' and attention must be paid to the 'importance and purpose' of the limitation and

[96]Anthony Lester and David Pannick, Human Rights Law and Practice(Butterworths 1999) Mureinik at 32.
[97]ibid
[98]ibid
[99]The court in SLAA acknowledged as much in Para 206 stating from the onset "Through the provisions of the Constitution, the people of Kenya have provided that the rights and fundamental freedoms guaranteed under the Constitution, with the exception of four rights set out in Article 25, are not absolute."

whether there is a less restrictive means of achieving the same end.[100] This model allows an examination of the rationale behind executive action. A challenge under the Bill of Rights opens up an inquiry into the justification of the decision challenged and the onus is on the decision maker to demonstrate the necessity of any limitation of rights within the Constitution.[101]

Secondly a deliberate choice of words in the Bill of Rights also required a more inquisitive attitude from the courts, requiring them to examine the justifications behind any limitation of rights. The choice of the word 'justifiable' as opposed to 'justified' is deliberate and implies that rather than merely submitting to the will of the elected branches, the courts were to consider if such actions were 'justifiable' and not whether they were 'justified'. The distinction is that when considering whether a particular decision is justifiable, judges are asking 'whether the decision maker has by reasons given shown it to be defensible'. The courts are not merely considering whether they would have adopted the same course of action, but whether that course of action is objectively justifiable. In the case of 'justification' the reasons behind the decision are irrelevant. All that matters is coincidence of content rather than the relationship between reasons and content and the court need only ask whether the decision made coincides

[100]The Constitution of Kenya 2010 Article 24(1)
[101]See SLAA para 209 "Once a limitation has been demonstrated, then the party which would benefit from the limitation must demonstrate a justification for the limitation."

with its own preferred decision. The reasons behind a particular course of action do not count.

Two elements of a culture of justification are identified above. First is the Constitution with a Bill of Rights providing rights which are integral to democracy. These rights are not absolutes but permit derogation in certain circumstances which allows courts to inquire into the justifications behind a particular action. Secondly, a new approach that critically examines the justifiability of the actions of the elected branches is required from the courts. These two features in the Constitution and the doctrine of proportionality which the court referred to in SLAA[102] have introduced a culture of justification, requiring any limitation of Constitutional rights to be justifiable.

Justifiability under Article 24(1) offers certain fundamental but interrelated beneficial effects that deserve highlighting and parallel those associated with proportionality analysis discussed below.

First, the requirement of justifiability exerts a disciplining influence on the Executive. In national security related disputes, the Executive is in a position to

[102]See para 209 where the court alluded to proportionality saying "As in this case, the State, in demonstrating that the limitation is justifiable, must demonstrate that the societal need for the limitation of the right outweighs the individual's right to enjoy the right or freedom in question." See also para.211 the court stating". The third principle is the principle of proportionality. It asks the question whether the State, in seeking to achieve its objectives, has chosen a proportionate way to achieve the objectives that it seeks to achieve. Put another way, whether the legislation meets the test of proportionality relative to the objects or purpose it seeks to achieve: referring to *R vs Chaulk*(1990) 3SCR 1303.

anticipate the need to justify its actions, and thus have a strong incentive to take matters of proportionality into account when developing policy and enact legislation.[103] In terms of Article 20(1), for example, the Constitution influences all stages of the policy-making process. Legislation proposed by the Executive must therefore be pre-screened for compliance with the Bill of Rights, and the Attorney General is mandated by the Constitution to examine any proposed legislation introduced in Parliament in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of the Constitution.[104]

If a serious challenge to constitutionality of a legislative or executive conduct is anticipated or if Parliament is responding to a judgment striking down executive decision or legislation, Parliament is likely to build an extensive record to ensure that it can meet its evidentiary burden under Article 24(3) later on.[105]

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[103]Richard Ekins, "Legislating Proportionately", in Grant Huscroft, Bradley W. Miller and Grégoire Webber, eds. (Cambridge University Press: 2014) 343. See also: Janet L. Hiebert, "Parliamentary Bills of Rights: An Alternative Model?" (2006), 69 Mod. L. Rev. 7, at 12-13; James B. Kelly, Governing with the Charter: Legislative and Judicial Activism and Framers' Intent (2005); M. Dawson, "The Impact of the Charter on the public policy process and the Department of Justice" (1992), 30 Osgoode L.J. 596.

[104]Article 156(4)(4) The Attorney-General—(*a*) is the principal legal adviser to the Government;

[105] Article 24(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied. See also the practice in Canada where in reviewing legislation on tobacco advertising enacted in response to a successful court challenge, the Court noted that the government had "presented detailed and copious evidence in support of its contention that where the new legislation posed limits on free expression, those limits were demonstrably justified under s. 1 of the Charter": *Canada (Attorney General) v. RJR-Macdonald*, [2007] 2 S.C.R. 610, at para. 8. The Court upheld the constitutionality of the new legislation.

Second, justifiability fosters the national values of transparency, accountability and trust under Article 10(2)(c),[106] because requiring reasons "invites a process of deliberation, discourse, and the active participation of the citizen in the democratic process. Without reasons and justifiability, there is no basis for discourse and exchange".[107] More generally, the analytical structure of proportionality favours a culture of justifiability, because it "forces judges to give an open and reasoned justification for intervention".[108] The proportionality test provides a framework through which courts can assign particular weights to particular considerations. It provides clear criteria that judges must answer before they can quash a decision.

Third, requiring a decision-maker to articulate reasons leads to better decision-making. As the Supreme Court of Canada recognized when discussing justifiability in the context of judicial review of discretionary administrative decisions, reasons "foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for a decision by itself may be a guarantee of a better decision".[109]

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[106]2) The national values and principles of governance include— (*a*) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (*c*) good governance, integrity, transparency and accountability;

[107]Moshe Cohen-Eliya and IddoPorat, "Proportionality and justification" (2014), 64 U of T L.J. 458, at 468.

[108]Guy Régimbald, "Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review" (2005-2006), 31 Manitoba L.J. 239, at p. 268. See also G. Wong, "Towards the Nutcracker Principle: Reconsidering the Objections to Proportionality", (2000) P.L. 92.

[109]*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 39.

Fourth, justifiability has positive effects on the separation of powers. In the context of Executive decision-making, "[b]y requiring the Executive to justify the exercise of its power and by requiring the judiciary to defer to reasonable justification, the roles each branch plays are made clearer".[110] In a culture of justification, "administrative bodies participate as partners with other institutions in the process of determining how fundamental rights commitments are to be interpreted and implemented".[111] As Janina Boughey says, in a culture of justification, "[t]he executive is obliged to give justifications for its decisions, and the judiciary is required to defer to those justifications where they are reasonable".[112]

Finally, imposing on the government the duty to justify its actions fosters an attitude of respect towards citizens,[113] which, in turn, increases compliance by citizens while reducing monitoring and compliance costs.[114]

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[110]David Dyzenhaus, "Proportionality and Deference in a Culture of Justification", in Grant Huscroft, Bardley W. Miller and Grégoire Webber, eds., Proportionality and the Rule of Law: Rights, Justification, Reasoning (Cambridge Univ. Press 2014) 234, at 255.
[111]David Dyzenhaus, "Proportionality and Deference in a Culture of Justification", in Grant Huscroft, Bardley W. Miller and Grégoire Webber, eds., Proportionality and the Rule of Law: Rights, Justification, Reasoning(Cambridge Univ. Press 2014) 234, at 256.
[112]Janina Boughey, "The Reasonableness of Proportionality in the Australian Administrative Law Context" (2015), 43 Fed. L. Rev. 59, at 84.
[113]Moshe Cohen-Eliya and IddoPorat, "Proportionality and justification" (2014), 64 U of T L.J. 458, at 466, referring to Kai Möller, "Proportionality, Rights Inflation and the Right to Murder" [unpublished].
[114]Mathilde Cohen, "Reasons for Reasons" in Dov M Gavvay et al, eds, *Approaches to Legal Rationality* (New York: Springer, 2010) 119. Available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401707.

### 3.8.2 Proportionality

The second element of a culture of justification as construed by Article 24(1) and identified in SLAA is the doctrine of proportionality which requires that any interference with rights be justified by not being disproportionate.[115] It consists of five stages: whenever there is infringement upon a constitutionally protected right, the doctrine requires consideration of first, the nature of the right or fundamental freedom; second, the importance of the purpose of the limitation; third, the nature and extent of the limitation; fourth, the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and fifth, the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Article 24(1) easily mandates proportionality because it allows for a more intense standard of judicial review and therefore contributes to the establishment of a culture of justification. It allows the judiciary to consider the justifiability of primary decisions to a much greater extent than was possible under the traditional grounds of judicial review associated with the judgment of Lord Greene MR in the *Wednesbury*[116] case and summarised succinctly by Lord Diplock in the *GCHQ*[117] case.

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[115]See SLAA at para 212 the court stating "If a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test."

[116]*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223 (HL) 228-230.

[117]*R v Minister for the Civil Service, ex p Council of Civil Service Unions* [1985] AC 374 (HL)

To illustrate the emphasis on justifiability and because the court in SLAA was unable to distinguish between them,[118] it is necessary to compare proportionality with the irrationality approach in *Wednesbury* that has been a feature of our jurisprudence pre 2010.

The *Wednesbury* doctrine grants the executive enormous latitude of discretion into which the courts will not intrude. It is a standard of review that is 'notoriously weak'[119] in its intensity. The emphasis is on judicial restraint or, as Taggart puts it, keeping 'the judges' noses out of the tent of politics.'[120] It is symptomatic of what Harlow describes as the 'classic model'[121] of judicial review, founded upon a rigid conception of the separation of powers and a highly restricted role for the judiciary.

The second distinguishing feature of *Wednesbury* irrationality is that the onus is on the applicant to demonstrate the irrationality of executive action. This implies the executive whose decision is being challenged does not have to give

[118]The court at para. 212 seemed no to make the distictiontion when it stated "If a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test. They must be rationally connected to the objective sought to be achieved, and must not be arbitrary, unfair or based on irrational considerations."
[119]Michael Fordham and Thomas de la Mare, 'Identifying the Principles of Proportionality' in Jeffrey Jowell and Jonathan Cooper (eds), *Understanding Human Rights Principles* (Hart 2001) 32.
[120]Michael Taggart, 'Proportionality, Deference, *Wednesbury*' [2008] NZLR 423, 429.
[121]Carol Harlow, 'A Special Relationship? American Influence on Judicial Review in England' in Ian Loveland (ed), A Special Relationship? American Influences on Public Law in the UK (Clarendon 1996) 83.

reasons for its actions.[122] As Taggart observes, administrative law has not historically regarded a requirement of reasons 'as an essential prerequisite to the validity of decision making.'[123] The executive was not obliged to demonstrate the justifiability of their decisions.

What emerges out of this comparison is that the intensity of review is somewhat greater under the proportionality approach because it demands a more active role from the courts. Rather than merely considering the rationality of a decision, judges would be required to assess the balance struck by the executive. Furthermore, greater attention is paid to the relative weight of rights and competing interests. In short, proportionality is a far more exacting standard of review than irrationality.

Proportionality has many distinct advantages over irrationality in matters of national security. For example, an important dimension of constitutional adjudication in national security is that courts are called upon to resolve conflicts between rights and interests on the one hand, and broader public interests or rights on the other hand. Proportionality when applied in national security adjudication offers a structured device for political-moral reasoning;[124] it separates the requirements of justification in a number of steps to streamline

[122]Fordham and de la Mare (n 61) 32.
[123]Taggart (n 62) 462.
[124]Charles-Maxime Panaccio, "In Defence of Two-Step Balancing and Proportionality in Rights Adjudication" (2011), 24 Can. J.L. & Juris. 109; Kai Möller, "Blancing and the structure of constitutional rights" (2007), 5 Int.'l J. Const. L. 453.

argumentation and decision-making. Proportionality, therefore, provides a framework that is communicable to those involved in judicial review, be they litigants or decision makers.[125] It acts as "a discursive frame for norm-based argumentation that enables the litigating parties and the judge to bridge the domain of law and the domain of interest-based conflict",[126] dividing the work involved between contesting parties, organizing how they present their arguments and engage their opponents' arguments, and dictating how courts will frame their decisions. By providing "a checklist of sorts",[127] proportionality serves an epistemic purpose. It provides an "analytical structure"[128] to deal with tensions between asserted rights and their limitations, between the constitutional values and interests at stake.

When constitutional challenges are anticipated, Parliament has tools at its disposal to show that the dictates of proportionality were respected. It can add preambles to legislation that state how the legislation is tailored to the

[125]Charles-Maxime Panaccio, "In Defence of Two-Step Balancing and Proportionality in Rights Adjudication" (2011), 24 Can. J.L. & Juris. 109. See also Mendelson, "On the Meaning of the First Amendment: Absolutes in the Balance" (1962), 50 Calif. L. Rev. 821, at 825: "Open balancing compels a judge to take full responsibility for his decisions, and promises a particularized, rational account of how he arrives at them – more particularized and more rational at least than the familiar parade of hallowed abstraction, elastic absolutes, and selective history".
[126]Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008-2009), 47 Colum. J. Transnat'l L. 72, at 87.
[127]Dimitrios Kyritsis, "Whatever Works: Proportionality as a Constitutional Doctrine" (2014), 34 Oxford Journal of Legal Studies 395, at 413.
[128]Mattias Kumm, "Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice" (2004), 2 Int'l J. Const. L. 574, at 579.

objective.[129] The government may also seek the Supreme Court's advisory opinion on proposed legislation under Article 163(6).

As a constitutional doctrine, proportionality analysis, has the very realistic potential to help the judiciary "manage potentially explosive environments, given the politically sensitive nature of rights review" and serves to "establish, then reinforce, the salience of constitutional deliberation and adjudication within the greater political system",[130] in consonance with the vision of the Constitution as a transformative document.

Justification and proportionality are closely related and are considered by courts within the context of 'a balancing exercise' and where applied in a structured manner easily form a predicable constitutional template upon which can be founded sustainable judicial precedent. That the Bench in SLAA failed to vigorously interrogate these doctrines was a lost opportunity to establish a Kenyan template on rights limitation in national security matters.

### 3.9. Criticisms of balancing and proportionality in rights limitation analysis.

Rights limitation jurisprudence largely conceives of a relationship between the different factors that need to be considered in the balancing exercise involving a

[129]Peter W. Hogg, Alison A. Bushell Tornton& Wade K. Wright, "Charter Dialogue Revisited—Or 'Much Ado About Metaphors'" (2007), 45 Osgoode Hall L.J. 1, at 48.
[130]Alec Stone and Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008-2009), 47 Colum. J. Transnat'l L. 72, at 87.

comparison of competing rights, values or interests. There are two possible ways about the expression.[131] One is that an interest or value will simply 'outweigh' another interest or value.[132] The other involves 'striking a balance' between two interests or values so that no right has to give way to another.[133]

Looking at the structure of Article 24(1) it is to be expected that the court would base its analysis of the reasonableness and justifiability of limitation on a methodical inquiry which proceeds in distinct stages: i.e.

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

The need to consider (b) arises only once (a) has been satisfied; (c) is addressed only once the (a) and (b) have been answered in the affirmative, etc. This

[131]T Alexander Alienikoff 'Constitutional Law in the Age of Balancing' (1987) 96 Yale LJ 943

[132] For example in*Makwanyane* supra, the court held that the applicant's right to life outweighed the state's interest in the death penalty for the sake of revenge and communal catharsis.

[133]For example in *Holomisa v Argus Newspapers Ltd* supra Cameron J held that in defamation cases involving the media, neither the plaintiff's rights to dignity or reputation outweighed the media's right to freedom of expression nor that the media's right outweighed the plaintiff's rights.

sequential inquiry is far removed from an approach based on balancing and a global judgment on proportionality. Not only is it more structured, but a 'balancing exercise' is undertaken only at the very end of the inquiry, once it has been established that the limitation meets (a), (b) and (c). If the limitation fails any of the first three legs, there is no need to engage in balancing, or to inquire into proportionality between ends and effects.

The sequential approach is worthy of emulation in post 2010 Kenya for a number of reasons. The first reason is that with the promulgation of the 2010 Constitution, Kenya is steadily shifting from almost fifty years of post-independence dictatorship to constitutional supremacy. Article 24(1) represents a bold attempt to come to terms with constitutional supremacy and the primacy of individual rights because it subjects fundamental-rights limitations to rigorous scrutiny and refuses to lend legitimacy to the limitation of rights in the name of utilitarian considerations. The sequential approach is also predictable and therefore promotes crisp and candid judicial reasoning.

On the other hand, it is debatable whether the balancing and a global assessment of proportionality approach shares the advantages cited above. Some scholars have argued that the balancing exercise is the antithesis of sound judicial reasoning. First, they have pointed out that it is impossible to reduce

conflicting interests to a single measure of value.[134] For instance, how is one to translate the right to a fair trial and national security into a common currency for comparison? An attempt at balancing would amount to an attempt to measure the immeasurable and to "compare the incomparable".[135]

Another criticism is that the constitutional text generally and Article 24(1) in particular provides no guidance on the relative weights to be attached to conflicting rights and interests. The judge would in probability, while attempting to weigh up all relevant interests, lose sight of the constitutional text. This is because the criteria for weighting and ranking interests will be based on the subjective preferences of individual judges.[136]

The foregoing criticisms raise fundamental concerns about the doctrine of separation of powers between the Executive, Legislative and Judiciary. Balancing of interests and values in any society is largely done through majoritarian democratic and political processes and that an unelected judiciary should never second guess the political arms of the state. Absence of established criteria for

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[134] See eg Aleinikoff "Constitutional law in the age of balancing" (1987) 96 Yale LJ 943 at 972-976; Pretorius "Meaning in constitutional interpretation" 1998 Acta Juridica 282 at 286-287; Tushnet "An essay on rights" (1984) 62 Texas LR 1363 at 1372- 1373; and Woolman "Out of order? Out of balance? The limitation clause of the final Constitution" 1997 SAJHR 102 at 114-119.

[135] Frantz "Is the first amendment law? A reply to Professor Mendelson" (1963) 51 California LR 729 at 748.

[136] Aleinikoff (supra) 977 writes that "balancing - by transforming any interest implicated by a constitutional case into a constitutional interest - is the ultimate non-interpretivism." See also Blaauw-Wolf "The 'balancing of interests' with reference to the principle of proportionality and the doctrine of Güterabwägung - a comparative analysis" (1999) 14 SA Public Law 178 at 198.

balancing raises the specter of judicial arbitrariness where judges mask controversial value choices under the cover of supposedly objective evaluation of values and interests.

Another criticism directed at the balancing and global proportionality approach is that it is the favourite of conservative benches that are associated with a cautious and incremental approach. The judge while balancing considers a broad range of consequences and considerations and invariably tends to restrict finding to the case at hand, as the next case may require a different balance. Whereas there are obvious advantages to such an approach, it is said to be unlikely to result in sweeping reform or bold innovation.[137] Put differently, the judge tends to take current distributions of wealth and power as the point of departure, instead of subjecting them to a transformative critique.

Another criticism is that judges often resort to cost-benefit analysis in an attempt to make their decisions appear objective. It has been observed that this may result in a new type of formalism, which precludes wider dialogue about important moral and political issues in society. In the words of Aleinikoff:[138]

> Scientifically styled opinions, written to answer charges of subjectivity, make us spectators as the Court places the various interests on the scales. The weighing mechanism remains a mystery, and the result is simply read off the machine.

[137] See Nagel "Liberals and balancing" (1992) 63 Univ Colorado LR 319.
[138] Supra 993.

> Scientific balancing decisions are neither opinions nor arguments that can engage us; they are demonstrations.

In view of these criticisms, obvious questions emerge as to why a judiciary which is constitutionally mandated to advance the cause of constitutional supremacy and fundamental human rights, and which seeks to establish its own institutional legitimacy and to establish a principled jurisprudence, would embrace a judicial method which is so controversial and fraught with danger?

These are difficult questions, and the Court's own judgment in SLAA provides only partial evidence in this regard. Because the decision was devoid of clear standards and tests for justifying governmental intrusions on a series of rights, there is a strong likelihood for inconsistency and contradiction.

What is certain is the need for establishment of a predictable standard of review to act as a point of reference in rights limitation jurisprudence.

### 3.10. Conclusion

The initial part of this Chapter laid out Kenyan judicial approach to judicial review and how it is constrained by common law even as the Constitution of Kenya 2010 has laid out a totally new dispensation. The latter parts set out to identify what limits and remedies are available to check Executive conduct by way of judicial review in matters of national security. In so doing the chapter interrogated the questions of whether, and to what extent it is allowed to curtail

civil liberties and Human Rights in order to combat international terrorism effectively. It has been shown that the unprecedented threat to Kenya by the threat of terrorism would seem to warrant restrictions of civil liberties and human rights. But it is also imperative to make sure that civil liberties and human rights do not hamper the government's ability to respond effectively to the threat. This creates the need for the judiciary to balance divergent interests by way of rigorous rights limitation analysis where the SLAA case was analysed for applicable standards if any.

The analysis illustrated that the High Court in SLAA did not implement any rigorous balancing and proportionality scheme, which significantly differentiates Kenyan courts' approach to human rights from the practices of Canadian and South African courts. The chapter has also shown how Canadian balancing is largely similar to the proportionality analysis that is also a feature of the South African Constitution. In these jurisdictions, the courts have developed standards of analysis that guide any court faced with a human rights case, regardless of the nature of the right involved because the questions asked at each stage of the analysis are similar. It is, however, difficult to point to comparable standards in the practices of Kenyan courts.

It has also been shown that Article 24(1) has cultivated a new "culture of justification" at the heart of our Constitution where any act or decision of the elected branches that limits a Constitutional right must be objectively *justifiable*

and must be supported by rational and cogent argument. The elected branches can no longer rely upon their democratic credentials to justify their actions. Central to this end is proportionality which has replaced *Wednesbury* irrationality as the standard of judicial review under the Article 24(1) because it allows for more rigorous review of executive and legislative decisions with a greater emphasis upon the reasons behind such decisions. As a result of Article 165(3)(d) and 23(1) allowing judicial review and for courts to hear and determine application for redress of a denial, violation or infringement of a right, we have moved away from a model of majoritarian democracy towards a model with greater respect for the individual rights enshrined in the Bill of Rights. This has drastically lowered the threshold that would allow the judiciary to intervene in matters of national security that prior were largely a preserve of the Executive.

A lingering concern is the democratic credentials of an appointive Judiciary vis a vis an elective Executive when it intervenes to check executive conduct on matters of national security. The dominant narrative supports judicial deference but Article 1 of the Constitution of Kenya 2010 seems to suggest otherwise. Chapter Five discounts judicial deference and explains why the Judiciary as conceived by the Constitution 2010 has as much democratic legitimacy as the executive in deciding on matters of national security.

## CHAPTER FOUR

## JUDICIAL REVIEW: A DESIRABLE AND EFFECTIVE WAY TO CHECK AND BALANCE EXECUTIVE AUTHORITY IN NATIONAL SECURITY MATTERS.

### 4.1. Introduction

Chapter Three has discussed how the judiciary could in future litigate constitutional rights should the executive plead rights limitation on grounds of national security. The currency of executive pleas in such litigation is often grounded on its functional competence and being elective as opposed to an appointive Judiciary. This concern is not academic as illustrated by the narrative propagated by President Kenyatta on the outcome of the 2017 presidential petition of an unelected minority deciding for the majority.[1] Chapter Four addresses itself to the question whether judicial review is a desirable and effective way to check and balance the exercise of executive power in matters of national security. This question forms the core of the Counter majoritarian difficulty—the ability of unelected judges to thwart majority will in a democracy.[2] For example, the difficulty manifests under Article 1(2) of the Constitution where "The people may exercise their sovereign power either directly or through their democratically elected representatives" but they have no certainty that their

[1] East African Standard 2nd September 2017 …"I respect the Supreme Court's decision but I don't agree with it… Millions of Kenyans queued and voted, but six people have decided that they will go against the will of Kenyans…"

[2] The Council of Governors and Others vs. The Senate Petition No. 413 of 2014: "… it is our finding that the doctrine of separation of power does not inhibit this Court's jurisdiction to address the Petitioner's grievances so long as they stem out of alleged violations of the Constitution. In fact the invitation to do so is most welcome as that is one of the core mandates of this Court".

decisions will prevail. If someone who disagrees with the exercise of a legislative or executive authority impacting rights decides to bring the matter before a court under Article 165(3), and the view that finally prevails is that of the judges, the difficulty emerges.

Desirability of judicial review of national security here imputes the legitimacy conferred on an institution by democratic or majoritarian attributes and the first part of this chapter explores and explains the majoritarian attributes of judicial review. It argues that sometimes the judicial arm freed of sectarian interests that hold back progressive change in the democratic arms and motivated by majoritarian proclivities of its own, is able to reflect the public will more accurately. It may in fact be that what triggers judicial intervention in the first place is because the public will is unable to find expression in the Executive or Legislature. This is merely an aspect of checks and balances. It illustrates that judicial review can, at times, be better at effecting the public will than the elected arms that are, under the Constitution, designed for that very purpose.[3] Ultimately, this reasoning rejects the narrow conception of judicial review as inherently antidemocratic and that it in fact, sometimes, supports democracy by ignoring the majoritarian process but ultimately, and more significantly, producing majoritarian results. This may be anathema for those who care more

[3] Speaker of National Assembly –vs. Attorney General and 3 Others (2013) eKLR … "Whereas all State organs, for instance,…, are under obligation to discharge their mandates as described or signaled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a solution in plebiscite, is only the Courts."

about process than results, and who view the judiciary as unelected and anti-democratic, and it is of no consequence that it may represent the majority will accurately than the elected arms. This chapter delves beyond the fact that the judiciary is unelected and reflects on how much that actually matters if the majority will is to be determined. It also analyses the forces that push the democratic arms away from majoritarian outcomes, and the judicial arm the opposite way.

The second part (4.5) also supports desirability of judicial review of executive conduct in national security by considering the effect of the Constitution of Kenya 2010 upon our traditional constitutional order. It clarifies the environment in which both the judiciary and the elected branches of government are now operating as a result of the new Constitution. It is argued that the Constitution has introduced a new order in which any limitation of constitutional rights must be objectively justifiable. By providing for justifiability, the Constitution is able to provide a general outline on how to measure and control the exercise of executive power in matters of national security. The judiciary has been charged with the responsibility of assessing such justifications. The obvious implication of this responsibility is that it paints a picture of judicial review that is much more complex than the conventional narrative of democratic and non-democratic arms allows.

The third part (4.6) investigates whether judicial deferment to the executive in national security is in fact a threat to the new constitutional order. The fourth

and final part (4.6) addresses and justifies the effectiveness of judicial review as a way to check and balance the exercise of executive power in matters of national security. The justifications for a vigorous judicial review of executive conduct in national security are enumerated.

### 4.2. What happens when the elected branches are 'undemocratic'?

The foremost theoretical justification offered for limitation of rights is that identification of threats to national security is a policy function and that the Executive is functionally better placed to identify and implement matters of policy than the judiciary.[4] This position reflects the supposed counter majoritarian nature of judicial review where a court does not exercise deference to the Executive.[5] According to Roberts Wray, the primary responsibility for governing the country rests with the Legislature and the Executive, and it is neither the function nor the wish of the judiciary to hinder or interfere more than necessary.[6]

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[4] But see... The Council of Governors and Others vs. The Senate Petition No. 413 of 2014:... "this Court [is] vested with the power to interpret the Constitution and to safeguard, protect and promote its provisions as provided for under Article 165(3) of the Constitution, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation."

[5] See Mark A Graber: " Foreword: From the Counter majoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power" (2006) 65 Md L Rev l; Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy" (1998) 73 NYU L Rev 333 at 335; Samuel Issacharoff, "Constitutionalizing Democracy in Fractured Societies" (2004) 82 Tex L Rev 1861 (equating judicial review with constitutionalism which "exists in inherent tension with the democratic commitment to majoritarian rule. At some level, any conception of democracy invariably encompasses a commitment to rule by majoritarian preferences, whether expressed directly or through representative bodies. At the same time, any conception of constitutionalism must accept pre-existing restraints on the range of choices available to governing majorities").

[6] Kenneth Roberts-Wray: "Human Rights in the Commonwealth" (1968) 17 Int'l & Comp LQ 908 at 924.

Beyond the foregoing arguments founded on constitutional theory, a way needs to be found around the counter majoritarian difficulty by projecting on the failings of the democratically elected branches to protect individual rights.[7] Political polarization, ethnicity, monied special interests, voter ignorance and electoral malpractices—are all dynamics that push democratic decision making away from majoritarian outcomes, just as there are a number of forces that push judicial review the opposite way.

Taken together, the theoretical and institutional approaches to rights limitation analysis suggest a possibility where the elected branches are actually the least majoritarian in practice. In this inverted scenario, a judicial ruling may look countermajoritarian only because the base line against which it is judged is the ostensibly democratic nature of the legislative and executive branches,[8] but it turns out to be more popular amongst the electorate.

In a scenario where a judicial decision is more popular than a legislative or executive act, it would overturn the basic premise of the countermajoritarian difficulty on its head, giving rise to a radically different understanding of

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[7] See Mark A. Graber, The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order, 4 ANN. REV. L. & SOC. SCI. 361, 362 (2008) (presenting literature review of how "scholarly concern with democratic deficits in American constitutionalism has shifted from the courts to electoral institutions," and noting that within the social sciences, "[t]he countermajoritarian difficulty is emigrating from the judiciary to the elected branches of government")

[8] See George I. Lovell, Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy, at xv (2003) ("The basic idea of th[e] conventional framework is that outcomes created by elected legislators form a democratic baseline against which to evaluate outcomes produced by other branches . . . ."); Thomas R. Marshall, Public Opinion and the Supreme Court 5 (1989) (lamenting the "ipso facto assumption that the policies of the popularly elected branches necessarily represent a nationwide public opinion majority.").

limitation analysis. Since majoritarianism assumes that the elected branches are democratic institutions and the unelected judiciary is not,[9] what happens when the opposite is true?

Instead of an undemocratic judiciary checking the democratic branches, we see a democratic judiciary checking the not-so-democratic branches, enforcing Human Rights and the popular will when the elected branches do not. This forms the basis of this thesis conception of the institution of judicial review under the Constitution as distinctly majoritarian.

A number of writers have recognized this phenomenon, noting that judicial rulings are often more majoritarian than the legislative or executive actions they invalidate.[10] What is, however, unclear is an understanding of the institutional forces that drive this phenomenon. The following analysis of the "SLAA" case is a case study of the dynamics behind the theory.

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[9] See Barry Friedman, Dialogue and Judicial Review, 91 MICH. L. REV. 577, 630 (1993) ("The countermajoritarian difficulty posits that the 'political' branches are 'legitimate' because they further majority will, while courts are illegitimate because they impede it. . . . [C]ountermajoritarian theory rests explicitly on the notion that the other branches of government 'represent' majority will in a way the judiciary does not . . . .").

[10] See, e.g., Barry Friedman, The Will of The People: How Public Opinion has influenced the Supreme Court and shaped the meaning of the Constitution 368 (2009) ("It frequently is the case that when judges rely on the Constitution to invalidate the actions of the other branches of government, they are enforcing the will of the American people."); Jeffrey Rosen, The Most Democratic Branch: How The Courts Serve America 4 (2006) ("How did we get to this odd moment in American history where unelected Supreme Court justices sometimes express the views of popular majorities more faithfully than the people's elected representatives?"); Michael J. Klarman, Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments, 44 STAN. L. REV. 759, 795 (1992) (reviewing Bruce Ackerman, We The People: Foundations (1991)) ("Where legislative self-interest is that intense, judicial review is likely to be more majoritarian than legislative decision making.").

### 4.3. How the ruling in SLAA could be democratic: Explaining judicial majoritarianism.

Academics appreciate that executives and legislatures are often less representative of majority views than is commonly assumed, and that in fact the judiciary is more representative of such views.[11] But such propositions have not altered the long held pillar of truth: Between the Judiciary, the Executive and Legislative branches the latter two reflect majority will better.[12] The eminent academic Larry Kramer has stated, "Legislatures do not perfectly mirror or translate popular will, and courts are to some extent responsive to democratic pressures. But it would be ludicrous to treat the two as comparable in this respect."[13]

It is highly probable that the court ruling in "SLAA" as laid out in Chapter Four was more representative of majority will than the legislation it invalidated. What is unclear is an understanding of why that might be so and the profound effect such understanding might have on views of judicial review of executive conduct.

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[11] See, e.g., Jesse H. Choper, Judicial Review and the national political process 10 (1980); See Barry Friedman, Dialogue and Judicial Review, 91 MICH. L. REV. 577, 630 (1993) at 590–630; Michael J. Klarman, Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments, 44 STAN. L. REV. 759, 795 (1992) (reviewing Bruce Ackerman, We The People: Foundations (1991) at 794 & n.209; Larry D. Kramer, Popular Constitutionalism, Circa 2004, 92 CALIF. L. REV. 959, 999 (2004).

[12] See, e.g., Jesse H. Choper, Judicial Review and the National Political Process 10 (1980); at 58 ("[T]he Supreme Court is not as democratic as the Congress and President, and the institution of judicial review is not as majoritarian as the lawmaking process."); Thomas R. Marshall, Public Opinion and the Supreme Court 5 (1989) (lamenting the "ipso facto assumption that the policies of the popularly elected branches necessarily represent a nationwide public opinion majority.").at 4 ("Admittedly, the election and decision-making procedures of popularly elected legislatures and executives are by no means purely majoritarian, but the Supreme Court is even more remote from public opinion and majority control."); Owen Fiss, Between Supremacy and Exclusivity, 57 SYRACUSE L. REV. 187, 200 (2007) ("Admittedly, Congress is an imperfect institutional embodiment of the democratic ideal . . . . Yet, Congress is a closer approximation of the democratic ideal than the judiciary . . . .");

[13] Supra note 8 at 999

This part attempts to explain the theory behind "SLAA", capturing and exhibiting the dynamics that drove the decision, while exploring the reasons why the executive, though democratic in theory may in practice be most undemocratic in practice.

There are a variety of reasons why the "SLAA" although formulated by a democratically elected executive and legislative branch may not have reflected majority will. On the one hand, it may have been a reflection of structural impediments to majority will and yet on the other hand it may have stemmed from the pull of politics. Standing alone, each of the following reasons would represent a distinct impediment to expression of majority will by the executive while setting the stage for judicial intervention.

### 4.3.1. Structural impediments to executive conduct

Although majority rule is considered to be the cornerstone of democratic governance, the Constitution of Kenya 2010 had a different sort of democratic governance in mind. The Constitution has structured our governing institutions to make change difficult, even when backed by majority will. By creating a number of veto points—opportunities to block change—the Constitution forms a democracy that requires the assent of not one, but multiple representative bodies to alter the status quo.

Within this system, the President is one veto point,[14] Parliament another—and within Parliament, our co-equal, bicameral legislature presents its own structural impediment.[15] In the Senate, counties with large populations like Nairobi, Kiambu, Nakuru and Kakamega get no more votes than those with small ones like Lamu and Tana River, resulting in disproportionate power for the least populated counties.[16] It is indeed probable that at a time in future the counties having a majority in the Senate will have a minority of the National Assembly. Should this happen, legislation emerging from Senate will have literally nothing to do with majority will.

Other structural impediments to the popular will in this category include the supermajority requirements for overriding the president's veto[17] and amending the Constitution.[18] The fundamental point here is that the very structure of our Constitution places significant obstacles in the way of Executive ability to enforce

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[14] Article 115. (1) Within fourteen days after receipt of a Bill, the President shall—
(a) assent to the Bill; or
(b) refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill.
[15] (4) Parliament, after considering the President's reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President's reservations, by a vote supported—
(a) by two-thirds of members of the National Assembly; and
(b) two-thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate.
(5) If Parliament has passed a Bill under clause (4)—
(a) the appropriate Speaker shall within seven days re-submit it to the President; and
(b) the President shall within seven days assent to the Bill.
[16] Article 98. (1) The Senate consists of—
(a) forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency;
[17] Supra note 12 Article 115 (4)
[18] Article 256(1) A Bill to amend this Constitution— (d) shall have been passed by Parliament when each House of Parliament has passed the Bill, in readings, by not less than two-thirds of all the members of that House.

majoritarian preferences. The answer to any lingering doubts why the executive branch does not any better reflect majority will is that the Constitution does not design it that way in the first place.

### 4.3.2. Political impediments to executive conduct

The second set of impediments to executive conduct are political in nature. Political impediments revolve around the question whether elected executives are agents of the people, duty bound to represent their views—or are they trustees, elected to do what they think is right, regardless of whether it reflects majority? The answer is unclear,[19] which allows for substantial discrepancies between the people and their elected representative.

The incumbency re-election rate may be one example.[20] Where incumbency advantages are so strong, social scientists are correct in concluding that voters lack meaningful say in who represents them[21]—and that, in turn, has antimajoritarian implications of its own. Incentives to respond to the public's wishes are stronger when the public can more easily strip [elected representatives] of their power and today in Kenya that ability is weak.

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[19] For an attempt to empirically answer this question, see Justin Fox & Kenneth W. Shotts, Delegates or Trustees? A Theory of Political Accountability, 71 J. POL. 1225 (2009).
[20] No incumbent President has lost an election in independent Kenya.
[21] Patrick Basham & Dennis Polhill, Uncompetitive Elections and the American Political System, POL'Y ANALYSIS, June 2005, at 1, 2–3; see also id. at 1–2 (reporting that 99.3% of "unindicted congressional and state legislative incumbents" won re election in the 1980s and recommending that elected officials be disconnected from campaign and election rule making and regulation);see also Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 GEO. L.J. at 498, 509–28 (discussing various entrenchment measures adopted by policymakers and concluding, "In [none of these entrenchment contexts] is legislative decision making likely to be majoritarian; judicial review quite plausibly would be more so".

Another example is the influence of special-interest groups such as the Kenya Bankers Association and the Tobacco Lobby. As public-choice theory has long recognized, a small but intensely interested minority can exert more influence than a large but diffusely interested majority.[22]

Yet another antimajoritarian force is the increasingly polarized nature of Kenyan political parties, attributed in large part to ethnicity and the exceedingly high percentage of safe seats where certain parties are dominant.[23] The dynamics of ethnic parties create "safe seat" constituencies where a nomination is as good as a win. This phenomenon eliminates competitive elections as a mechanism by which representatives are held accountable to mainstream public opinion. The executive is then often a result of a coalition of ethnic communities politicians who pander to the narrow ethnic base, not the median voter, resulting in what political scientists Jacob Hacker and Paul Pierson describe as "policymaking that starkly and repeatedly departs from the centre of public opinion."[24]

The Kenyan public's input into the political process is also an important source of democratic dysfunction as well. The average Kenyan voter is "rationally ignorant", rarely appreciates the benefits of a well-informed vote and prefers party and ethnic as opposed to policy preferences.[25] It is reasonable therefore to

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[22] See generally James M. Buchanan, Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications, in The Theory Of Public Choice—II, at 11 (James M. Buchanan & Robert D. Tollison eds., 1984) (providing a summary of "the emergence and the content of the 'theory of public choice'");

[23] 2013 National Elections TNA-Kikuyu, ODM Luo/Luhya, URP-Kalenjin, Wiper-Kamba etc.

[24] See Jacob S. Hacker & Paul Pierson, Off Center: The Republican Revolution And The Erosion of American Democracy 9, at 16, 19 (2005).

[25] Ilya Somin, Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory, 89 IOWA L. REV. 1287, 1290, 1370 (2004) at

assume that executive conduct cannot be considered as a product majority will in any meaningful sense.

The above listed political dynamics work to prevent the executive and legislative branches from being truly representative of the majority will.

### 4.3.3. Topic-Specific impediments to executive conduct

The nature of the issue under consideration can, and often does, create impediments to majoritarian change of its own. One way this can happen is if support for a policy is correlated with a particular demographic constituency, but which is underrepresented in the executive which can safely ignore the issue.

The other possibility in this category is issues that are too hot, or cold, for the executive to handle. An issue can be too hot—too polarizing—to trigger a response from the executive branch for a number of reasons. Sometimes the executive finds it too costly to take a stand on an issue. Unwilling or unable to decide the issue itself, the executive will facilitate, invite, solicit, and even plead for judicial involvement.[26]

An issue also may be too cold—too low priority—to trigger a response from the executive branch. Such issues are rarely, if ever, executed because they are out

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1324–29 (supporting "rational ignorance" theory of low voter knowledge with empirical evidence). Interestingly, politicians tend to be "rationally ignorant" themselves. Given the volume and technical detail of proposed legislation, legislators rarely have the time to ponder the bills they are voting on, turning instead to party leadership or political allies to tell them how to vote. See Jason T. Burnette, Note, Eyes on Their Own Paper: Practical Construction in Constitutional Interpretation, 39 GA. L. REV. 1065, 1093 (2005).

[26] Thomas M. Keck, Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools, 32 LAW & SOC. INQUIRY 511, 516 (2007) (book review).

of step with prevailing social imperatives, but the very fact that they are rarely, if ever, enforced is what keeps them low priority.[27] Low political prioritisation explains why the executive may be ill-suited to remedy the problem.[28] Cold issues such as these lack democratic legitimacy, so judicially invalidating them is not radically inconsistent with democratic ideals.

In concluding this section, reasons have emerged which show why although democratically elected, the executive may not accurately represent majoritarian views. The next question then becomes how judicial decision-making compares and how it may in fact be a more accurate representation of majority views.

### 4.4. Why the Judiciary may be most representative in practice

Judicial decision making differs from executive decision making in at least two respects. First, in the Supreme Court, for example, a majority of four carries the day and since it is the apex court, it can set new precedent by changing its own decisions. Second, judicial decision making is free of electoral pressures which define executive decision making.[29] Judicial independence is enhanced since the justices are appointed and enjoy security of tenure until the age of seventy years. The fact of the court not being the subject of an electoral process would suggest

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[27] Cass R. Sunstein, What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage, 2003 SUP. CT. REV. 27, 50–58 (analyzing same-sex-sodomy statutes as an example of this phenomenon).

[28] George I. Lovell & Scott E. Lemieux, Assessing Juristocracy: Are Judges Rulers or Agents?, 65 MD. L. REV. 100, 107 (2006) ("[R]epeal campaigns never develop much momentum because lack of enforcement makes the campaign seem mostly symbolic and thus less important than fights over more consequential laws.").

[29] See Article 160. (1) In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

that it is less majoritarian than the executive. But as seen above, electoral pressures are themselves cause of why the executive is often times less majoritarian and the Judiciary, being free of the same pressures more majoritarian. In the absence of the pull exerted by partisan elections, the Judiciary is freed of the majoritarian impediment to decision making…the democratic process itself.

The fact that the judiciary, although a non-majoritarian institution, could reflect the majoritarian will begs the question *why?* An understanding of the mechanisms by which majoritarian influences infiltrate and legitimise judicial law making are not well understood. If understood, such would fortify the democratic legitimacy of judicial review and lessen objections to judicial review of executive conduct in matters of national security. The following sections, however, make an attempt at classifying and clarifying those mechanisms.

### 4.4.1. Judicial appointments process

The judicial-appointments process under Article 161 is the primary explanation for the judiciary's majoritarian proclivities.[30] Judges are recommended by the

[30] See William Mishler & Reginald S. Sheehan, Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective, 58 J. POL. 169, 171 (1996) (recognizing judicial-appointments process as the "conventional explanation of the relationship between public opinion and Supreme Court decisions"); see also Terri Peretti, An Empirical Analysis of Alexander Bickel's The Least Dangerous Branch, in The Judiciary And American Democracy: Alexander Bickel, The Countermajoritarian Difficulty, And Contemporary Constitutional Theory 123 at 132 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005) [hereinafter The Judiciary And American Democracy] ("[T]he countermajoritarian features of American democracy . . . were deliberately adopted by the Framers precisely because of their antimajoritarian effects. Federalist 10 clearly expresses the Framers' strong fears of majority tyranny.")., at 132 (noting that "[m]ost scholars agree that the appointment process is the dominant path through which public opinion influences Supreme Court decisions");

Judicial Service Commission, appointed by the President and in the case of the Chief Justice and the Deputy Chief Justice subject to the approval of the National Assembly.[31]

The composition of the Judicial Service Commission aside, the President who appoints judges and the legislators who confirm them are presumably political actors who favour the appointment of judges with political and ideological leanings similar to their own and the constituents who elected them.[32]Implicit in this theory is the assumption that elected officials have majoritarian policy preferences by virtue of their election, so judges appointed in their likeness will have majoritarian policy preferences too.

The foregoing notwithstanding, the judicial-appointments process is not a complete explanation for judicial tendencies to make majoritarian decisions. Judges have a judicial life expectancy much longer than those who put them on the Bench, so their views could easily differ from the prevailing ideology of any given moment.[33]

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[31] 166. (1) The President shall appoint—
(a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and
(b) all other judges, in accordance with the recommendation of the Judicial Service Commission.

[32] See Lee Epstein et al., The Supreme Court as a Strategic National Policymaker, 50 Emory L.J.583, 586 (2001)

[33] See Article 167. (1) A judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years.
See also Steven G. Calabresi & James Lindgren, Term Limits for the Supreme Court: Life Tenure Reconsidered, 29 HARV. J.L. & PUB. POL'Y 769 (2006) (documenting the average tenure of retiring Justices from 1971 to 2000 at just over twenty-six years).

### 4.4.2. Majoritarian constraints on judicial decision making

A second explanation for judicial majoritarian proclivities is that the force of majority will imposes constraints on the Judges' ability to deviate significantly, and for long from the majority views. A judiciary with non-majoritarian views will not always be able to pursue those views because ultimately the execution of its decisions will fall on the executive rendering it not so independent after all. Because it lacks the power of enforcement, the Judiciary has three compelling reasons why it should never digress from majoritarian preferences even where it could. These are to ensure that its rulings are enforced, to protect itself from retaliatory legislative measures, and to preserve its institutional legitimacy. These reasons are each discussed in turn.

The judiciary needs the support of the executive branch to make its rulings matter by ensuring obedience and yet the Executive may choose to undermine or simply ignore the ruling instead. In recognition of this impediment, judges act strategically as a result, anticipating the reaction of the executive branch and adjusting their decisions accordingly.[34] Although majoritarian rulings do not guarantee that the executive branch will enforce them, the public's anticipated reaction does play an integral part in the mix. The more popular the ruling, the riskier it will be for the Executive to oppose or subvert it; conversely, the more unpopular the ruling, the more difficult it will be for executive officials will

[34] See Lee Epstein et al., The Supreme Court as a Strategic National Policymaker, 50 EMORY L.J. at 610 (2001); ("Tests at both the individual and the aggregate levels support the proposition that the Justices adjust their decisions in anticipation of the potential responses of the other branches of government.");

commit to enforcement. In sum, one reason for the Judiciary to be concerned to issue majoritarian rulings is the worry over its execution by the executive.

The other reason the Judiciary will look out to issue majoritarian rulings is the possibility of the Executive implementing measures to compel it to toe the line. The Executive can push through Parliament measures to curtail its budget, pack its JSC membership, strip its jurisdiction or even propose constitutional amendments to reverse its rulings.[35]

Here again, majority will plays a part in the mix. The more unpopular the court's decision, the more likely that the executive branch will not execute it, and the converse is true as well; the Executive will retaliate against the Judiciary only when doing so does not militate against the public will. Ultimately the judiciary is safest going with the majority will.

The last majoritarian constraint is the Judiciary's need to preserve its institutional legitimacy. When judicial rulings go unenforced, or the Judiciary itself is attacked, judges lose some modicum of political power, which, over time, can render the judiciary vulnerable to further disregard and attacks by the democratic branches.[36]

In conclusion, the main reason the Judiciary is majoritarian is that it often has little choice. Majority will imposes significant constraints on the Judiciary's

[35] See Jesse H. Choper, Judicial Review and The National Political Process 10 (1980) at 47–55 (discussing variety of court-curbing measures); Neal Devins & Louis Fisher, The Democratic Constitution 22–28 (2004)

[36] See, e.g., Lawrence Baum & Neal Devins, Why the Supreme Court Cares about Elites, Not the American People, 98 GEO. L.J. at 1530

ability to deviate from majority preferences. The next question then becomes how much such constraint matters.

### 4.4.3 Majoritarian influences on judicial decision making

In the same manner as majority will constrains the Judges decisions, it also influences the decisions they ultimately make. This is largely attributable to the larger cultural backdrop against which cases are decided. Because the Constitution is largely a declaration of principles as opposed to a strict set of rules it is inherently indeterminate and therefore subject to interpretation. This makes it unavoidable that its interpretation will be reflection of attitudes, assumptions—even prejudices—that define a given place and time.[37] Steven Winter makes the same point when he says,

> "[J]udges cannot even think without implicating the dominant normative assumptions that shape their society," resulting in "unarticulated normative assumptions that shape and produce legal outcomes with distinctly majoritarian overtones."[38]

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[37] As Oliver Wendell Holmes explained, "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Oliver Wendell Holmes, The Common Law 1 (Harvard Univ. Press 1963) (1881); see also Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality 294 (2004) at 5–6 ("[B]ecause constitutional law is generally quite indeterminate, constitutional interpretation almost inevitably reflects the broader social and political context of the times."); see also Larry Kramer, Generating Constitutional Meaning, 94 CALIF. L. REV. 1439, 1441 (2006); at 1440 (noting "the inevitable ways in which the views of courts and judges are shaped by the evolving understandings of the societies in which the judges also live").

[38] Steven L. Winter, An Upside/Down View of the Countermajoritarian Difficulty, 69 TEX. L. REV. 1881, 1925, 1927 (1991); see also Lawrence M. Friedman, Coming of Age: Law and Society Enters an Exclusive Club, 1 ANN. REV. L. & SOC. SCI. 1, 10 (2005) ("In some ways, people are like animals born and raised in zoos; they are not aware that their world of cages and enclosures is highly artificial, that their range of behavior is limited by conditions they did not create for themselves. . . . This is true for legal behavior as much as for any other form of behavior.").

Just like everybody else, judges are also a product of a particular time and space that defines their existence.

The pull of dominant public opinion is another majoritarian force which influences the decision making of judges. Empirical studies have proved that dominant public opinion is a statistically significant and powerful influence on the Judges.[39] On the impact of public opinion on judicial decision making, Chief Justice Rehnquist wrote over twenty years ago, "Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs."[40] Whether judges decisions are influenced by social opinions or factors that that shape social opinions, the ultimate result is that whatever the outcomes of their decisions, such decisions will tend to reflect majority opinions.

In conclusion, there are numerous factors that would account for judicial decisions leaning towards majoritarianism. This is not to suggest that courts always make majoritarian decisions but rather, it explains why the judiciary in many respects reinforces majoritarian views so that the institution that is not

[39] Kevin T. McGuire & James A. Stimson, The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences, 66 J. POL. 1018, 1033 (2004) ("We set out trying to determine whether the Supreme Court responds directly to movements in public opinion and whether the data used in prior analyses undercut accurate estimation of this relationship. We have unusually clear answers to both. . . . [W]e have found that the Court's policy outcomes are indeed affected by public opinion, but to a degree far greater than previously documented.")
[40] William H. Rehnquist, Constitutional Law and Public Opinion, 20 SUFFOLK U. L. REV. 751, 768 (1986).

thought of as majoritarian often is and those that are majoritarian sometimes are not.

It is, however undesirable that even with the lowering of the threshold for judicial intervention, there is still no statutory nor judicial template that could define the precise perimeters of such intervention. That is the weakness that has been identified in the system of judicial review generally and in matters of national security in particular. The section that follows argues that Article 24(1) presents an as yet unexplored opportunity for a proportionality template.

### 4.5. Has Article 24(1) presented a new constitutional order?

At the core of the hypothesis for this thesis is that Article 24(1) has imposed a justificatory burden upon those in power requiring them to justify the actions they took. Central to this is the Bill of Rights which proclaims standards of justification.

Significantly, the rights contained in the Bill are not absolutes that prevail in all circumstances. Each right is capable of restriction through the general limitation clause in Article 24(1) which sets out the conditions upon which restrictions of a right can be justified. A restriction must be 'reasonable and justifiable in an open and democratic society'[41] and attention must be paid to the 'importance of the purpose'[42] of the limitation and whether there is a less restrictive means of achieving the same end.[43] This model enables an examination of the rationale

[41] Constitution of Kenya 2010 Article 24(1)
[42] Ibid Article 24(1)(b)
[43] Ibid Article 24(1)(e)

behind executive or legislative action with the consequence that a challenge under the Bill of necessity opens up an inquiry into the justification of the decision challenged. The onus is on the primary decision maker to demonstrate the necessity of any limitation of constitutional rights.

The second but less tangible features of justification introduced by the Constitution were debate, criticism and challenge.[44] A more inquisitive attitude is required from the courts by Article 24(1). Courts are expected to critically evaluate justifications advanced for any limitations of rights rather than merely submitting to the will of the elected branches.

The third feature introduced by the constitution which will shape the practice of judicial review generally is Article 10.[45]National values and principles of governance provided for by Article 10(2) bind the courts whenever it applies or interprets the constitution and any law. These values and principles complement interpretative principles.

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[44] David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 SAJHR 11, 13.

[45] Article **10.** (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons any of them—
(*a*) applies or interprets this Constitution;
(*b*) enacts, applies or interprets any law; or
(*c*) makes or implements public policy decisions.
(2) The national values and principles of governance include—
(*a*) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
(*b*) human dignity, equity, social justice, inclusiveness, equality, human rights, non discrimination and protection of the marginalised;
(*c*) good governance, integrity, transparency and accountability; and
(*d*) sustainable development.

Using these two features as points of reference it is evident that the Constitution of Kenya 2012 at Article 24(1) has transformed the judicial landscape through a culture of justification, requiring any limitation of constitutional rights to be justifiable.

At the heart of Article 24(1) is a desire to reconcile individual and social interests. As individuals we value the rights protected in the Constitution but also accept that it is often necessary to restrict such rights in the interests of the wider society. This latter concern is informed by a utilitarian instinct, requiring us to act in a manner that produces the greatest good for the greatest number.[46] Because of their qualified nature, it is apparent that social concerns inform the application of constitutional rights under the Bill of Rights so that they may be limited to accommodate communal interests advanced by the elected branches of government.

An appreciation of wider social interests concerns together with recognition of the role of the Executive and Legislature in the identification of those interests allows the Constitution to act as a vehicle for the interrogation of the extent to which rights can be derogated from. The Constitution by allowing derogation from constitutional rights creates a forum for interrogating the justifications behind Parliamentary or Executive action. A limitation provision gives the Executive an opportunity to show that the limitation is justifiable.[47] If like in the

[46] John Stuart Mill and Jeremy Bentham, Utilitarianism and Other Essays (Penguin 1987).
[47] Dyzenhaus, 'Law as Justification' (n 40) 32.

United States, rights are absolute principles over which the courts exercise sole authority, there is no scope for a justificatory examination. The only question that must be answered in such circumstances is: has a right been breached? In contrast, in the Kenyan model where most of the rights are not absolutes, it must also be asked: why has a right been breached and are the reasons sufficient to justify the breach? Article 24(1) makes every exercise of power 'the proper subject of the process of justification'[48]by allowing an assessment of the justifiability of a limitation of a right.

In concluding this section, this work finds that the Constitution of Kenya 2010 has introduced a new constitutional order. Under this order, the executive branch of government can no longer rely solely upon its majoritarian credentials and functional competence when limiting constitutional rights. Instead they are required by Article 24(1) to objectively justify their decisions, they must demonstrate that their decisions are justifiable not just *Wednesbury* rationality of old. As a result of Article 24(1) we have 'moved away from a model of majoritarian democracy'[49] towards a model with greater respect for the individual rights enshrined in the Constitution. The requirement of justifiability should ensure that such rights are not easily restricted.

[48] Ibid 36
[49] Jeffrey Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] PL 671, 682.

### 4.6. Is national security a threat to the new Constitutional order?

Having argued that the Constitution of Kenya 2010 has established a new constitutional order, in which the executive and legislature are required to objectively justify any limitation of constitutional rights, it is now time to examine how the judiciary has responded to this new order. This section critiques the deference doctrine which features in the early case law. Founded upon a rigid conception of the separation of powers that spawned *Wednesbury*, the doctrine of deference to the Executive and Legislature has been used by the courts to avoid sufficiently robust review of rights infringement. As such, the doctrine of deference to the Executive and Legislature poses a significant threat to the culture of justification.

In *Patrick Ouma Onyango & 12 others Vs Attorney General and 2 others*[50] the court asked whether it should interfere with an executive or legislative output stated:

> The answer the court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of common sense and the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters.[51]

The court in stating the above relied on *Blackburn vs Attorney General*[52] and particularly the decision of Salmon L.J; who stated that:

[50] Nairobi, High Court Misc. App. 677 of 2005 (O.S) [2005] eKLR
[51] ibid
[52] [1971] 1 WLR 1037

> Whilst I recognise the undoubted sincerity of Mr. Blackburn's views I deprecate litigation the purpose of which is to influence political decisions. Such decisions have nothing to do with the courts. These courts are concerned only with the effect of such decisions if and when they have been implemented by legislation. Nor have the courts any power to interfere with the treaty-making power of the sovereign. As to Parliament, in the present state of the law it can enact, amend and repeal any legislation it pleases. The role and power of the court is to decide and enforce what is the law and not what it should be now or in the future.[53]

The decisions above would only point to the fact that the Court can only intervene in matters that fall outside the territory of the elected institutions. There is obviously no appreciation of the need for justification of executive and legislative output as ordained by Article 24(1).

It has also been held that if the text of the Constitution[54] or the original understanding of its meaning, as reflected in its "structure and underlying political theory," persuasively leads to the conclusion that the elected branches rather than the Court should be the final arbiter of its meaning, then the courts should keep off. Here too there is no consideration of the requirement for the need for justification in terms of Article 24(1).

[53] ibid

[54] See Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425, which held that:- "In our view there is considerable merit.....that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

On a reading of Article 10(1) of the Constitution, the Supreme Court has stated that that judicial resolution is not appropriate where it is clear that the political question doctrine will apply.[55]

Sentiments akin to the above have been expressed by the High Court of Kenya where the Court expressed itself as follows:

> It is clear that the President is always vested with certain important and unrestricted political powers and in the exercise of such powers the President is to use his own discretion. .. The question therefore is whether all persons charged with duties and responsibilities to carry the express and implied political will of the President are immune from actual judicial review when they are said to be acting not as prescribed by law. There is a view that when acting politically and not as provided for and prescribed by the law all executive appointees' actions can only be examined politically and not legally because their acts are covered and provided for under political question doctrine which states that being political acts they are non justiciable and not reviewable by a court. [56]

When determining the constitutionality of a limitation of a constitutional right the courts in the above cases deem it necessary to accord the decisions of the elected branches a presumptive weight based on an assumption that those institutions might be better placed to assess the specific requirements of a situation. The courts reason that under the circumstances Parliament and the Executive occupy a superior position to the courts in the determination of questions of policy.

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[55] Speaker of the Senate & another v Hon. Attorney-General & another & 3 others [2013] eKLR Advisory Opinion Reference No. 2 OF 2013.

[56] Republic v Minister for Tourism & another Ex-parte Abdulrahman Rizik & 4 others [2014] eKLR ,High Court of Kenya at Nairobi Misc Application No 1313 of 2012

The danger inherent in such an assumption is that particular categories of legislative and executive action such as national security can effectively be placed beyond the reach of judicial review. Judicial deference is tantamount to a justiciability doctrine, premised on the idea that certain issues are not in any circumstances amenable to judicial determination.[57] Since the doctrine assumes that the elected branches are better placed to make certain decisions, such as those relating to matters of national security, it encourages the judiciary to avoid any meaningful review of such decisions.

As argued in the previous section, Article 24(1) of the Constitution has replaced an assumption in favour of the superior status of the elected branches with a requirement that they justify any decision or action they take that limits constitutional rights. That is the new constitutional order and the courts are charged with the responsibility of assessing such justifications.

The doctrine of deferment has been applied by the judiciary in cases concerning issues of acute political controversy. An example of such an issue is immigration. This section is dedicated to an examination of some notable immigration cases where deferment, even if not explicitly named as such, has proved significant in the reasoning of the courts. The examination of the case law is intended to demonstrate that the doctrine has been used by the courts to avoid the more sophisticated judicial review required under the Constitution. As argued above,

[57] TRS Allan, 'Human Rights and Judicial Review: A Critique of 'Due Deference" [2006] CLJ 671, 687.

the doctrine of deferment negates the requirement that the Executive and Legislature objectively justify the limitation of a constitutional right, in contravention of the culture of justification.

A recent manifestation of the doctrine of deferment came in the case of *Republic v Minister of State for Immigration and Registration of Persons Ex-Parte C.O*[58] which combined the judicial hot potatoes of immigration and national security. The key question on which the case hinged was whether the applicant Christopher Nnanyeru, a Nigerian national suspected of trafficking in drugs did actually pose a threat to national security. If he did then the deportation order made under section Section 33(1) (d) of Kenya Citizenship and Immigration Act, 2011 which provides for persons termed as 'Prohibited Immigrants' and section 43 (1) which gives power to the Minister (Cabinet Secretary) to remove persons who are unlawfully present in Kenya was lawful, if not, the deportation could not be justified. Despite the central importance of the question to the legality of the deportation, the High Court refused to confront it. Instead the court granted the Executive a wide discretionary area of judgment to determine whether the applicant was a threat to national security. Supporting this position the court said:

> In this decision we are not concerned with the merits of the Respondent's decision. The Respondent may well have had good reasons for taking the decision it did. We are however concerned with the process of arriving at the said decision. In *Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008]*

[58] NRB HCJR Misc. Civil Application No. 5 Of 2013.

> *eKLR* it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.[59]

For the court, the issue was not the merits of the decision to deport but rather the procedure of arriving at the decision. The court's preferred course of action grants huge discretion to the Executive in this field of decision making. By so holding, the court refused to question the Executive's assertion that the applicant's continued presence in Kenya posed a threat to national security. The court ignored the exhortation of Article 24(1) by not seeking justification for the Minister's claim.

In the case of *Republic vs. Judicial Service Commission ex parte Pareno*[60] it was also held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since

[59] ibid
[60] [2004] 1 KlR 203-209

the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles.

In the case of *Republic v Cabinent Secretary, Ministry of National Security & Interior Co-ordination 3 others Ex parte Shukri Adihafid & another*[61] the High Court again recognised that the decision whether or not to grant remedies of judicial review is an exercise of judicial discretion and that in deciding whether or not to grant the discretionary judicial review remedies the Court must take into account whether or not the grant thereof is efficacious in the circumstances obtaining. At paragraph 36 the court stated that: "judicial review reliefs are not grounded on sympathy but are based on illegality, irrationality and impropriety of procedure" of the decision.

In the case of *Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa*[62] the High court observed that since it exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the granting of the order.

Discretion that is a feature of all the foregoing cases is a deference factor that underlies reluctance by courts to challenge executive conduct on matters bearing on national security. The position adopted by the courts in all the above cases would appear to suggest that the courts consider matters of policy as a no go area and are unwilling or unable to consider any cases. Such a position runs

[61] NRB HC Judicial Review Case No. 318 Of 2014.
[62] HCMA No. 96 of 2000.

counter to the very purpose of Article 24(1). As Lord Steyn argues, in principle "there cannot be any no-go areas under the Constitution and for the rule of law."[63] Seeking to immunise certain categories of decision making, such as national security and immigration, undermines the protection of individual rights that the Constitution is supposed to facilitate. It does not require the Executive to objectively justify the limitation of Constitutional rights. It is the antithesis of the more stringent judicial review required by the culture of justification under Article 24(1).

The approach adopted by the High Court in these and many other cases goes counter to the culture of justification. It is couched in the language of *Wednesbury* unreasonableness which, as demonstrated in Chapter Three and previous chapters, has been declared inadequate for Human Rights review. In *Wednesbury*, the Minister merely had to establish that is was reasonable to conclude that the limitation of a constitutional right was necessary, not that it was actually necessary or proportionate. In all these cases, rather than focusing upon the justifications behind the limitation the High Court instead emphasised the judicial discretion while avoiding any meaningful examination of the Minister's decision. The level of judicial scrutiny was not sufficiently strong.

In conclusion, Article 24(1) must transform court practice in judicial review of national security matters through a complete overhaul of judicial discretion and deference doctrine. This is because both like the *Wednesbury* doctrine are

[63] Lord Steyn, 'Deference: A Tangled Story' [2005] PL 346, 351.

founded upon a strict conception of the separation of powers doctrine that severely limits the judicial role in the determination of rights. While trying to avoid substituting its own judgment for that of the Executive and Legislature, the Judiciary has often failed to insist on objective justification for the limitation of qualified Constitutional rights. As such the judiciary has failed to meet its obligations in the new constitutional order established by Article 24(1). The discretionary area of judgment ought to suffer the same fate as *Wednesbury* in the context of Human Rights. It must be consigned to the dustbin of history an embodiment of the old constitutional order that existed prior to Article 24(1).

### 4.7. Can vigorous judicial review of Executive conduct in national security be justified?

The last two sections have suggested that with some exceptions, the courts have failed to play a more active role in scrutinizing executive conduct in national security. This in turn raises the question whether such scrutiny can be justified. In what follows, it will be suggested that vigorous judicial review can be justified given the importance of respecting human rights when protecting national security and the nature of modern judicial review which often allows the state a continued opportunity to enact less rights invasive but equally effective measures to combat terrorism. Judicial review can also be justified on the basis that respect for human rights can help democracies maintain the moral high ground in their struggles with threats to national security such as terrorists who are prepared to violate human rights and kill innocent people because of their race or religion or nationality.

### 4.7.1. Courts have a constitutional role in protecting Human Rights.

In terms of Article 23(1), courts have authority to uphold and enforce the Bill of Rights. This Article provides a constitutional mandate that courts should be minded whenever need arises to balance national security interests with Human Rights in the era of international terrorism. Courts the world over have also become increasingly aware that the need to respect human rights is an important part of democratic approaches to counter-terrorism.

The Supreme Court of Canada has adopted the idea articulated by Aharon Barak that a democracy must fight terrorism "with one hand tied behind its back. Nonetheless, it has the upper hand."[64] In another example of courts being influenced by each other[65], the House of Lords in *A v. Secretary of State* relied on ideas of proportionality developed by the Supreme Court of Canada.

The Supreme Court of India has recognized that "[i]f human rights are violated in the process of combating terrorism, it will be self-defeating. Terrorism often thrives where human rights are violated…"[66]

The failure by courts to protect human rights, especially the torture of terrorist suspects in other countries, has constrained the ability of many countries to use deportation as an instrument to counter terrorism. There is need for protection

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[64] *Re Section 83.28 of the Criminal Code* [2004] 2 S.C.R. 248 at para 7 quoting H.C. 5100/94, *Public Committee Against Torture in Israel v. Israel*, 53(4) P.D. 817, at p. 845 and Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002), 116 *Harv. L. Rev.* 16, at pp. 150-51.

[65] Ran Hirshl "The Rise of Comparative Constitutional Law" (2008) 3 Indian J.of Constitutional Law 11.

[66] *People's Union for Civil Liberties v. Union of India,* (2004) 9 SCC 580.

of human rights to ease cross border fight against terrorism. Much of the international community will find it easier to co-operate with countries that take steps to improve the protection of human rights and in particular to respect the absolute right against torture.

### 4.7.2. Courts have a constitutional role in enforcing nondiscrimination by protecting the rights of minorities.

There is need for respect for the constitutional value of right to equal treatment of all so that it is not seen that the liberty of unpopular minorities is being exchanged for the security of the majority. One of the most eloquent defenders of the need for respect for equality in antiterrorism efforts has been Ronald Dworkin.[67] In Kenya, some anti-terrorism efforts have the effect of violating the rights of ethnic Somali minorities and Moslems.[68] The denial of rights to ethnic Somalis and Moslems suspected of terrorism cannot be said to be rationally connected to preventing terrorism given that the terrorist threat also came from other Kenyan citizens.

Such profiling practices can cause considerable grievance among those targeted for discriminatory treatment. At the same time, they may not be effective because they encourage terrorist groups to use those who do not fit the profile. They are

[67] Ronald Dworkin "The Threat to Patriotism" New York Review of Books Feb. 28, 2002. Dworkin's theory of judicial review have been criticized for giving unelected judges too much power. See for example JeremyWaldron "The Core of the Case against Judicial Review" (2006) 115 Yale L.J. 1346.

[68] Mohammed, Guled (9 January 2013). "Kenya: The Cost of Harassing Somalis Over Terror". The Star. Retrieved 13 January 2020. See also: : Jeremy Lind, Patrick Mutahi & Marjoke Oosterom (2017) 'Killing a mosquito with a hammer': Al-Shabaab violence and state security responses in Kenya, Peacebuilding, 5:2, 118-135.

an ineffective substitute for more precise intelligence gathering and social cohesion.

The High Court of Kenya has unfortunately been less sensitive to equality concerns. It dismissed an equality challenge to deportation under immigration law that based on the reasoning that non-citizens unlike citizens do not have a right to remain in Kenya.[69] Such reasoning, however, does not address the necessity for exposing noncitizens to lower standards of adjudicative fairness.

Racial or religious discrimination in enforcing anti-terrorism laws offends equality values, but it may also be counterproductive in producing feelings of ill-will among different classes of the populace. Reliance on racial or religious stereotypes will produce many false negatives where innocent people are subject to investigation, but also false positives that ignore terrorists who do not fit the profile or stereotype.

### 5.7.3. Courts have a role in ensuring limits are not disproportionate.

In terms of Article 24(1) courts can reject some law as disproportionate because they are not rationally connected to the objective of national security or the least rights invasive means of achieving that goal. In such cases, the court is simply telling the Executive that they can pursue the objective of ensuring national security just as well in a manner that infringes rights less.

[69] Republic v Cabinent Secretary, Ministry of National Security & Interior Co-ordination 3 others *Ex parte Shukri* Adihafid & another NRB HC Judicial Review Case No.318 of 2014.

Much judicial supervision of executive conduct in national security has been driven by the requirement that the Executive justify the proportionality of measures that justify limitation of rights. Such ideas are implicit in article 24(1) of the Constitution that provides for justification of reasonable limits on rights.[70]

The critical question in proportionality analysis will often be whether the state's legitimate objectives can be achieved in a manner that restricts rights less. It is open for a court to conclude that less rights invasive alternative policies would not be as effective in the conditions faced in particular circumstances to fulfill the executive's objectives. Proportionality analysis requires a justification about why alternatives that would violate rights less will not work.

### 4.7.4. Judicial review is a welcome dialogue between courts and the Executive.

Judicial review of executive conduct does not necessarily result in judicial supremacy but in fact allows the Executive to engage in a dialogue with the judiciary by pushing for legislation that is aimed at achieving proportionality. If, for example, the executive action is not specifically authorized by the Legislature, the court can declare the action invalid, especially in cases where the action may invade rights. Such judicial activism while it affirms the rule of law, also provides

[70] Drawing on Article 24(1), the Constitution describes the requirements of proportionality in the following terms:
(a) the nature of the right or fundamental freedom;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

the Legislature with an opportunity to assume responsibility for the executive action by explicitly authorizing it.[71] The courts may then have to decide whether the new legislation is a proportionate restriction on rights.

The Judiciary can also use remedies as a tactic to incite dialogue with the Executive by suspending the declaration that an existing law is invalid with the implication that there is no immediate remedy for the applicant while allowing the Executive and Parliament time to devise a better law. It is also conceivable that Courts may be prepared to be more active when relieved of the burden of finality and judicial supremacy that comes with the declaration of invalidity or unconstitutionality but instead leaves the Executive or Legislature with a variety of respectable alternatives that includes simply ignoring the decision.

An appropriate approach would be a court decision that requires explicit legislative authorization for questionable executive conduct which can be defended as democratically legitimate because it requires the legislature to take responsibility for the executive action.

[71] In a case where a court strikes down executive action such as racial or religious profiling that singles out a person for enhanced investigation because of their perceived race or religion , the legislature will then have an opportunity to decide whether it wishes explicitly to sanction such discrimination. Elner Elhauge *Statutory Default Rules* (2008) ch 9. For arguments that legislatures in most democracies would be reluctant explicitly authorize racial or religious profiling see Sujit Choudhry and Kent Roach "Racial and Ethnic Profiling: Statutory Discretion, Democratic Accountability and Constitutional Remedies" (2003) 41 Osgoode Hall L.J. 1.

### 4.7.5. It is insufficient that executive conduct may be designed to secure right to security or life.

Some commentators have advanced the proposition that courts should evaluate rights limiting executive conduct with a focus on the rights of actual and potential victims the conduct it sets out to regulate and not only with a focus on those whose rights could be infringed. For example, Irwin Cotler, a human rights lawyer, has argued that anti-terrorism legislation should not be evaluated exclusively "from the juridical optic of the domestic criminal law/due process model" but rather should be seen as "'human security' legislation".[72] In India, Soli Sorabjee, another human rights lawyer, has argued that the right against terror is part of the right to life in Article 21 of the Indian constitution and places a positive obligation on the state to take counter-terrorism measures.[73]

Such arguments militate against the traditional liberal idea that constitutional rights are designed to protect individuals from the state as opposed to violence by non-state actors such as terrorists. Indeed, imposing a legal duty or a positive obligation on the state to prevent all acts of terrorism would be quite unrealistic. It would also beg the question of why victims do not have an enforceable right to be protected from all crime.

Even if it were to be accepted that victims and potential victims of terrorism have a right to life or security that is violated by terrorism, such victim rights cannot

[72] Irwin Cotler "Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy" in R. Daniels et al *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (2001)at 112

[73] Soli Sorabjee, Law and Justice (2004)

be used as an excuse to deny those suspected or accused by the state of crime. Another problem with this approach is that by focusing on the rights of the victim, it allows rights to be limited without an opportunity to interrogate the principles of proportionality so that limits might be imposed on the rights of the accused even when such limits are not truly necessary and there are less rights invasive alternatives.

Finally, the idea that victims and potential victims of executive conduct have an enforceable and positive right to life or security unfortunately often amounts to a false promise to those victims, especially if the state uses victims as a justification for harsh security measures that are designed to facilitate the interests of the Executive without providing adequate compensation for the terrible harm suffered by victims of terrorism and their families[74].

**4.7.6. Exaggerated claims of legislative expertise.**

The idea that the elected branches of government have a greater democratic legitimacy and functional competence on matters of national security than the judiciary is often overrated. As the legislature scrambled after various terror attacks to enact SLAA, many began to realize that legislative decision-making often left much to be desired. SLAA was enacted very quickly for symbolic reasons and in response to traumatic events when there is not enough time or information for proper deliberation. The immediate aim of such legislation is to

[74] Kent Roach; September 11: Consequences for Canada (2003) at 80-83

re-assure the public.[75] Courts should not ignore evidence that much legislative policy-making in the terrorism areas is made up without full information or time for deliberation.

In *A*, the House of Lords implicitly repudiated Lord Hoffmann's idea that the elected branches of government had greater democratic legitimacy than the courts when Lord Bingham stated that he did not accept the distinction that the Attorney General "drew between democratic institutions and the courts." Although "judges in this country are not elected and are not answerable to Parliament", they do play a democratic role in enforcing the rule of law. As such, it "is wrong to stigmatise judicial decision-making as in some way undemocratic."[76] The House of Lords was acting under a jurisdiction that Parliament had provided it under the *Human Rights Act*. The broader point, however, is that courts are starting to recognize that respect for rights, including those of unpopular minorities, are some of the reasons why democracies have moral superiority in their encounters with terrorism and that courts can play an important role in curbing legislative overreactions to terrorism.

### 4.7.7. Exaggerated claims of executive expertise.

One of the important components of judicial deference is the idea that the Executive has greater knowledge and expertise in matters of national security. However, one of the fallouts of a range of well-publicized intelligence failures from

[75] Bruce Ackerman, Before the Next Attack (2006).
[76] *A v. Secretary of State* 2004 UKHL 56 at para 42.

the Mandera bus attack,[77] Westgate[78] and Garissa University[79] and on the international scene, the Iraq Weapons of Mass Destruction debacle, the London bombings and the November 2008 attacks in Mumbai has been a growing lack of confidence in the ability of intelligence agencies to make accurate determinations of dangers. All of these well-publicized intelligence failures may persuade some judges not to be as deferential to the conclusions reached by the national executive security agencies.

Another dimension of exaggerated claims of executive expertise is the tendency of the Executive to use secrecy as a weapon. The Executive can claim secrecy in an attempt to avoid accountability for failure and abuses. In Canada, there has been a pattern of over claiming secrecy that has been used in unsuccessful attempts to avoid accountability for incompetent police and intelligence work that has either wrongly identified people to be security threats while failing to identify real suspects. Courts must be able to get behind these secrecy claims if there is to be effective review and accountability of the Executive.[80]

Outright abuse and overuse of secrecy have the unintended effect of eroding claims of executive expertise in national security matters. The judiciary can

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[77] Al-Shabab kill 14 in Northeren Kenya, The East Afrcan Tuesday July 2015.
[78] Analysis of Al-Shabab's Attack at the Westgate mall in Nairobi, Kenya. NYPD November 1, 2013 Retrieved 29th October 2017.
[79] Kenya al-Shabab attack: Secuirty Questions as Garisssa dead mourned" BBC News Retrieved 29th Ocober 2017
[80] For a Canadian judicial inquiry that found that a Maher Arar and his wife were wrongly labeled as Islamic extremists associated with Al Qaeda and that the government responded by both overclaiming secrecy during the commission and leaking damaging and supposedly secret information about Arar before the inquiry see Commission of Inquiry into the Activities of Canadian Officials in Relation to Maher Arar *Recommendation and Analysis* (2006).

through judicial review, promote a more disciplined and sparing use of secrecy to better protect human rights while at the same time arguably improving the executive's response to terrorism.

### 4.8. Against judicial review

The many criticisms which have been raised against judicial review in Kenya may be summarized as follows: First, it has led to irregular changes in the constitution by the courts and second, public policy has been determined in many cases by the courts rather than the executive and legislature. These have been changes which the courts have introduced through constitutional interpretation when reviewing statutes or executive authority.

The most far-reaching change is the displacement of the constitution from its position as the supreme law by the introduction of various ideas of justice, natural rights, and common law concepts as superior to the written word. This has been exemplified by Justice Rawal:

> Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots,

> whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits.[81]

The effect of this interpretative philosophy is that case after case the Constitution is being shaped or reshaped by the judiciary whose judgment depends largely upon the values and temperament of the men and women who from time to time compose it. This is tantamount to substituting judgment by judges for judgment by law.

### 4.9. Conclusion

The first part of this chapter has examined how courts could, by adopting an upside down way of looking at democracy, review the actions and decisions of the elected branches under Article 24(1) of the Constitution. The part has demonstrated how an upside down understanding of the institution of judicial review reinforces the democratic credentials of judicial review. This understanding has lowered the threshold for judicial intervention and should ultimately legitimise judicial democratic responsiveness whenever matters of national security are subjected to judicial review.

The second part explores how the judiciary has balanced the exercise of executive power in matters of national security by identifying a new constitutional order presented by Article 24(1) and the challenges that executive conduct in matters of national security have presented in judicial review. The conclusion here is that Article 24(1) must transform court practice in judicial review of national security

[81] Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331

matters through a complete overhaul of judicial discretion and deference doctrine.

The third part argues that the doctrine of deference poses a threat to the new constitutional order by curtailing the ability of courts to interrogate executive conduct in matters of national security. The final part has addressed the concern whether judicial review is a necessary and effective way to measure and control the exercise of executive power in matters of national security. The many justifications for a vigorous judicial review of executive conduct in national security matters are enumerated.

## CHAPTER FIVE

## POSSIBLE JUSTIFICATION OF LAWS THAT ENCROACH ON RIGHTS.

### 5.1. Introduction

In the first chapter of *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya &10 others*[1] the court made the very significant observation that "protecting national security carries with it the obligation on the State not to derogate from the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010." This single statement places ensuring national security with all the challenges it involves at the core of the case. The court then stated that it is how the State manages this balance that was largely addressed by the court in its analysis of the case. There were various rights that are identified in the case as specifically impacted by the legislation in question.[2]

This chapter initially identifies challenges faced by security agencies as they seek to protect national security. It then examines the various rights analysed by the court in the SLAA case and other laws which although they may not have been specifically mentioned in the judgement are nevertheless frequently applied by the Executive in matters of national security which encroach upon constitutionally enshrined rights and freedoms and discusses how such laws

[1] [2015] eKLR para 1
[2] Para 89: a. The right to freedom of expression and the right to freedom of the media guaranteed under Articles 33 and 34;
b. The right to privacy under Article 31;
c. The rights of an arrested person under Article 49 and the right to fair trial under Article 50;
d. Entitlement to citizenship and registration of persons under Article 12;
e. The right to freedom of movement under Article 39 and the rights of refugees under Articles 2(5) and 2(6) of the Constitution and International Conventions.

might be justified. The approach adopted in this chapter is to identify the right or liberty, whether they require particular scrutiny and justification and if so how the judiciary might do this —by applying what standard and following what type of process. This should provide a predictable framework for judicial review of executive conduct bearing on those rights.

Each section of this chapter considers a particular constitutional right or liberty that often have a bearing on matters of national security to ascertain how limits on the rights and freedoms can be 'appropriately justified'. This involves testing the law according to a particular measure or standard—such as legitimate objectives and proportionality. Laws that pass this standard might be said to have been *substantively* justified and therefore passed the justification test under Article 24(1).

### 5.2. Challenges faced by national security agencies

The right to freedom and security of the person is provided in Article 29.[3] The state is the primary custodian and duty bearer of the right and has the responsibility to establish security mechanisms to protect, promote and fulfil the right for all within its jurisdiction. The country has no shortage of normative nor

[3] Article 29: Every person has the right to freedom and security of the person which includes the right not to be- (a) Deprived of freedom arbitrarily or without just cause;
(b) Detained without trial, except during a state of emergency, in which case the detention is subject to Article 58; (c) Subjected to any form of violence from either public or private sources
(d) Subjected to torture in any manner, whether physical or psychological;
(e) Subjected to corporal punishment; or
(f) Treated of punished in a cruel, inhuman or degrading manner.

legislative framework for realisation of this right.[4] With such a robust constitutional and legislative framework aimed at promoting national security, the country continues to suffer breaches to her national security. The reason for this is to be found in the challenges security agencies face as they struggle to bridge the gap between the law practice. The following are the challenges.

Youth unemployment: According to the 2009 census the total number of individuals below age 34 constituted 78.31% of the total population.[5] Out of this number, slightly over 60% make up the country's labour force and growing at an estimated at 10%.[6]

Youth unemployment together with perceptions of real and imagined marginalization are factors contributing to vulnerability and proclivity to radicalization.[7] Interviews and research conducted by KNCHR in 26 counties on the matter of security from 2010 to 2014 confirmed existence of high levels of unemployment among the youth.[8] Further, the research and interviews

[4] National Police Service Act, 2011; the National Police Service Commission Act, 2011; the Independent Policing Oversight Authority Act, 2011 and the National Intelligence Service, Act 2011 among others.
[5] Katindi Sivi Njonjo. 2010. "Kenya Youth Fact Book" p. 8. Institute of Economic Affairs & Friedrich-EbertStiftung.
[6] Daniel Forti & Grace Maina "The danger of marginalization: An analysis of Kenyan youth and their integration into political, socio-economic life"
[7] KNCHR's work on conflict management in Mombasa County in 2013/14. This was a project funded by the British High Commission and was undertaken in Mombasa County. Through it the KNCHR sought to the capacity of the devolved structures within that County to manage conflict by applying the human rights approach to development.
[8] The interviews and research were conducted in the following counties: 1. Nairobi 2. Lamu 3. Kirinyaga 4. Nakuru 5. Uasin Gishu 6. Kisumu 7. Kisii 8. Baringo 9. Bungoma 10. Tana River 11. Nyamira 13. Mandera 14. Marsabit 15. Mombasa 16. Kericho 17. Moyale 18. Nandi 19. Mombasa 20. Wajir 21. Isiolo 22. Trans Nzoia 23. Turkana 24. Samburu 25. Kwale 26. Kilifi 27. Busia

established the involvement of many unemployed youth in criminal activities through militia and extortionist gangs[9]and gangs for hire.[10]

Unfavourable working conditions for police: The working conditions and terms of service of police are poor which renders them unable to perform optimally in ensuring national security and maintaining law and order.[11]The Ransley Report on Police Reforms recommended improving the working conditions and terms of service for the police by proposing: the provision of adequate housing; medical cover and life insurance; leave days and improvement of police salaries and allowances.

Corruption within security agencies: Corruption within the security agencies has been an impediment in efforts to government efforts to manage security and address insecurity. A culture of corruption within security agencies erodes confidence between law enforcement officers and members of the public which creates a security vacuum. In many places the vacuum so created has been filled by vigilante groups and militias. Such groups have turned out to be the worst purveyors of insecurity due to their extra-legal character.[12]

Slow pace of security sector reforms: Due to stalled or slow reform the police service has not transited to a new mindset that appreciates changes anticipated

[9] This is a practice mostly found in Nairobi, Kisumu, Kisii, Kirinyaga, Nakuru and Nyamira
[10] The Commission found out that at times the politicians and business people use the services of unemployed idle youth to fan or perpetuate incidents of violence (in a bid to maintain political or economic supremacy) or interethnic conflict.
[11] See Ransley Report ; The Task Force on Report on Police Reforms Report (2009).
[12] National Research Crime Centre. (2012). Summary of a Study on Organized Criminal Gangs in Kenya.

by Article 10 of the constitution.[13] Cases of extra-judicial killings allegedly perpetrated by the police or criminal elements collaborating with rogue police officers—without any meaningful accountability, save for effort by IPOA to redress the same—are a manifestation of the stalled or slow pace of police reforms. Many Kenyans have lost their lives to police and gun-related violence while in Mombasa, prominent Sheikhs and Imams suspected of involvement in terrorism activities have been murdered in yet unresolved cases.[14]

The 2010 constitution made demands for structural and welfare reforms to be carried out in the National Police Service which are way behind schedule. A persistent culture of impunity has contributed to too many cases of insecurity, gross violation of human rights, mistrust by citizens and derailment of key achievements in democratic governance.[15]

The challenges discussed above have exposed some of the weaknesses in the country's security architecture and call for an interrogation of the security system a bit more closely in order to understand how it intersects with select constitutional rights.

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[13] Article 10(2) (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non discrimination and protection of the marginalized.
[14] Human Rights Watch, *Kenya: Killings, Disappearances by Anti-Terror Police*, 18 August 2014, available at: https://www.refworld.org/docid/53f30efb4.html [accessed 15 April 2020]
[15] Douglas Lucas Kivoi, Casty Gatakaa Mbae. The Achilles' Heel of Police Reforms in Kenya. Social Sciences.
Vol. 2, No. 6, 2013, pp. 189-194.

### 5.3 Article 31: Freedom of Association.[16]

Freedom of association is the right to join or leave groups of a person's own choosing, and for the group to take collective action to pursue the interests of members. It involves coming together with other individuals and collectively express, promote, pursue and defend common interests and is primarily manifested through the right to join a trade union, free speech or debating societies, political parties, or any other club or association such as religious groups, fraternities, or sport clubs.

This freedom is widely regarded as a fundamental right and is closely related to other fundamental freedoms, particularly freedom of speech. It has been said to serve the same values as freedom of speech: 'the self-fulfilment of those participating in the meeting or other form of protest, and the dissemination of ideas and opinions essential to the working of an active democracy'.[17]

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[16] Article **36.** (1) Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.
(2) A person shall not be compelled to join an association of any kind.
(3) Any legislation that requires registration of an association of any kind shall provide that—
(*a*) registration may not be withheld or withdrawn unreasonably; and
(*b*) there shall be a right to have a fair hearing before a registration is cancelled.

[17] Eric Barendt, *Freedom of Speech*(Oxford University Press, 2nd ed, 2007) 272. 'For many people, participation in public meetings or less formal forms of protest—marches and other demonstrations on the streets, picketing, and sit-ins—is not just the best, but the only effective means of communicating their views … Taking part in public protest, particularly if the demonstration itself is covered on television and widely reported, enables people without media access to contribute to public debate':

The 19th century author of *Democracy in America*, Alexis de Tocqueville, considered freedom of association as 'almost as inalienable as the freedom of the individual':

The freedom most natural to man, after the freedom to act alone, is the freedom to combine his efforts with those of his fellow man and to act in common … The legislator cannot wish to destroy it without attacking society itself.[18]

The United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association explained the importance of these rights, as empowering people to:

> express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable.[19]

Freedom of assembly and association serve as vehicles for the exercise of many other civil, cultural, economic, political and social rights.

International law also recognises rights to peaceful assembly and to freedom of association. For example, the *International Covenant on Civil and Political Rights* (ICCPR) provides for 'the right of peaceful assembly' and the 'right to freedom of

[18]Alexis de Tocqueville, *Democracy in America* (Library of America, 2004) 220. See also Anthony Gray, 'Freedom of Association in the Australian Constitution and the Crime of Consorting' (2013) 32 *University of Tasmania Law Review* 149, 161.
[19]UN Human Rights Council, The Rights to Freedom of Peaceful Assembly and of Association, 15th Sess, UN Doc A/HRC/RES/15/21 (6 October 2010).

association including the right to form and join trade unions'.[20]

In addition, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides for the 'right of everyone to form trade unions and join the trade union of his choice'.[21]

### 5.3.1. Laws that interfere with freedom of association

An array of laws may be seen as interfering with freedom of association, broadly conceived. Some of these laws impose long recognised limits on freedom of association for example, in relation to associating with criminals and preserving public order. Arguably, such laws do not encroach on the traditional freedom, but help define it. However, these traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.

Some of the laws which may be characterised as interfering with freedom of association are to be found in the following areas:

#### 5.3.1.1. Prevention of Terrorism Act No 30 of 2012.

Section 24 of the Prevention of Terrorism Act No 30 of 2012 provides for the offence of membership of a terrorist organisation.[22] A terrorist group is described under section 2 as '(a) an entity that has as one of its activities and purposes,

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[20] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 21, 22.

[21] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 8. Williams and Hume stated: 'the right to freedom of association is recognised in the ICCPR while the right to form trade unions (which can be seen as a subset of the right to freedom of association) is recognised in the ICESCR': Williams and Hume, above n 15, 4.

[22] Section 24. A person who is a member of, or professes to be a member of a terrorist group commits an offence and is liable, on conviction, to imprisonment for a term not exceeding thirty years.

the committing of, or the facilitation of the commission of a terrorist act; or (b) a specified entity'.

Section 22 provides for offences of allowing the use of buildings, vessels and aircraft to commit offences, by permitting a meeting or assembly of persons to be held with the intention of committing an offence organizing or facilitating commission of an offence under the act.[23]

In addition, the terms of an order made by the Cabinet Secretary under section 3(3) on the recommendation of the Inspector General of Police under section 3(1) that an entity is a 'specified entity' may contain a prohibition or restriction on a person communicating or associating with specified individuals.[24]

The import of section 3(1)(b)(iii) making provision for associating with an entity an offence may disproportionately shift the focus of criminal liability from a person's conduct to their membership of an organisation.

In addition, under section 3(3) assessing justification for the Inspector General's recommendation of declaration of a specified entity is difficult, given the broad

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[23]22. A person who— (a) being the owner, occupier, lessee or in charge of any building premises or place, authorizes a meeting of persons to be held in that building, premises or place; or
(b) being the owner, charterer, lessee, operator, agent or master or pilot of a vessel or aircraft authorizes the use of that vessel or aircraft,
for the purpose of committing an offence or organizing or facilitating the commission of an offence under this Act commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty years.

[24]See section 9. (1) A person who knowingly supports or solicits support for the commission of a terrorist act by any person or terrorist group commits an offence and is liable, on conviction, to imprisonment for a term not exceeding twenty years.
See also section 24**.** A person who is a member of, or professes to be a member of a terrorist group commits an offence and is liable, on conviction, to imprisonment for a term not exceeding thirty years.

'reasonable grounds to believe' discretion to so recommend and the absence of publicly available binding criteria to be applied in arriving at the recommendation.[25] By calling on the affected entity to demonstrate why it should not be declared as a specified entity, the suspect is presumed to be guilty and the burden of proof is unjustifiably shifted to him.[26]

The problem with the process of specifying terrorist group under section 3 is that it often involves the attribution of defining characteristics and commonly shared motives or purposes to a group of people based on the statements or activities of certain individuals within the group. Further, an organisation can be listed as a terrorist group simply on the basis that it 'advocates' the doing of a terrorist act.[27]

Criminalisation of associating with terrorist groups offence is also problematic in the sense that mere association with a terrorist group may not be intentional and may not be directly linked to the planning and execution of an attack.

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[25]3. (1) Where the Inspector-General has reasonable grounds to believe that—
(a) an entity has—
(i) committed or prepared to commit;
(ii) attempted to commit; or
(iii) participated in or facilitated the commission of, a terrorist act; or
(b) an entity is acting—
(i) on behalf of;
(ii) at the direction of; or
(iii) in association with, an entity referred to in paragraph (a), he may recommend to the Cabinet Secretary that an order be made under subsection (3) in respect of that entity.

[26]Section 3(2) Before making a recommendation under subsection (1), the Inspector-General shall afford the affected entity an opportunity to demonstrate why it should not be declared as a specified entity.

[27] See section 2 "terrorist group" means—
(a) an entity that has as one of its activities and purposes, the committing of, or the facilitation of the commission of a terrorist act; or
(b) a specified entity;

Despite the legitimacy of the broad aims of Prevention of Terrorism Act, no 30 of 2012,[28] it is debatable whether targeting individuals by criminalising association with terrorist groups is effective, appropriate and constitutional.

### 5.3.1.2. Prevention of Organised Crimes Act, No 6 of 2010.

The constitution of Kenya Article 2(5) and (6) acknowledges international law. On 15th N0vember 2000 Kenya adopted the United Nations Convention Against Transnational Organized Crime which came into force on 25th December 2005.Under this Convention, Kenya has enacted the Prevention of Organised Crimes (No 6 of 2010) Act. The overarching objective of this statute is to restrict freedom of association in circumstances where criminal associations may pose a threat to peace and order. For example, the legislature is justified in infringing freedom of association in order to disrupt and restrict the activities of criminal organisations and their members.

The object of such law is to restrict the freedom of association of certain classes, groups or organisations of persons involved or likely to be involved in the planning and execution of criminal activities. The object is 'legitimised by the incidence and sophistication of what is generally called "organised crime"'.[29]

[28]AN ACT of Parliament to provide measures for the detection and prevention of terrorist activities; to amend the Extradition (Commonwealth Countries) Act and the Extradition (Contiguous and Foreign Countries) Act; and for connected purposes

[29] See Prevention of and Organised Crimes Act, No 6 of 2010. Object: An Act of Parliament to provide for the prevention and punishment of organised crime; to provide for the recovery of proceeds of organised criminal group activities and for connected purposes.

Section 3 of Prevention of Organised Crimes Act, no 6 of 2010 provides for offences of associating in support of serious organised criminal activity and supporting a criminal organisation. The justification for this law is questionable since it essentially shifts the focus of criminal liability from a person's conduct to their associations. This law has the potential to unduly burden freedom of association for individuals with a familial or community connection to a member of a criminal association.

Although the broad aim of this law is legitimate,[30] it is questionable whether targeting unexplained income through criminalising association is effective and suitable.

Fundamentally, the act, by its very nature, impinges on a person's right to freedom of association because the net cast by section 3(a) to (o) on what qualifies as organised criminal activity is wide enough to pick up a large range of entirely innocent activity.

**5.3.1.3. Public Order Act cap 56.**

Most limitations of the right of public assembly are contained in the Public Order Act cap 56 including unlawful assembly under section 5. The Act is stated to be 'An Act of Parliament to make provision for the maintenance of public order and for purposes connected therewith.'

[30]ibid

Under section 5(1) no person shall hold a public meeting or a public procession except in accordance with the provisions of the section and where in terms of section 5(2) any person intending to convene a public meeting or a public procession shall notify the regulating officer of such intent at least three days but not more than fourteen days before the proposed date of the public meeting or procession.

In terms of section 5(10) any public meeting or public procession held contrary to the provisions of the act is deemed to hold an unlawful assembly. Under section 5(11) any person who takes part in any public meeting or public procession deemed to be an unlawful assembly under subsection (10), or holds, convenes or organises or is concerned in the holding, convening or organising of any such meeting or procession shall be guilty of the offence of taking part in an unlawful assembly under Chapter IX of the Penal Code and liable to imprisonment for one year.

**5.3.1.4. Kenya Citizenship and Immigration Act No.12 of 2011.**

Freedom of association is also implicated by provisions of the Kenya Citizenship and Immigration Act No. 12 of 2011 concerning the circumstances in which a person may be declared a prohibited immigrant.

Section 33(1)(i) of the Act provides that 'a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates or is sympathetic to acts of terrorism or terrorist activities directed against Kenya or

detrimental to the security of Kenya or any other state' may be declared a prohibited immigrant.

Section 33(1)(p) provides that 'a person who is or has been at any time a member of a group or adherent or advocate of an association or organization advocating the practice of racial, ethnic, regional hatred or social violence or any form of violation of fundamental rights' may be declared a prohibited immigrant.

These two sections of the Citizenship and Immigration Act make it clear that membership of, or association with, a group or organisation that has or is involved in criminal conduct is, by itself grounds for declaration as a prohibited immigrant.

The effect of these sections is to lower the threshold of evidence required to show that a person who is a member of a criminal group or organisation, such as a terrorist organisation or other group involved in war crimes, people smuggling or people trafficking is a prohibited immigrant. The intention is that membership of the group or organisation alone is sufficient to cause a person to be declared a prohibited immigrant. Further, a reasonable suspicion of such membership or association is sufficient to not pass the prohibited immigrant test. There is no requirement that there be a demonstration of special knowledge of, or participation in the suspected criminal conduct by the individual.

There is fundamental concern about these provisions and they should be considered as failing a test of proportionality because under Article 36, people should be able to choose their acquaintances and connections without

government interference. These two sections plainly encroach on freedom of association. Because the consequence of being declared a prohibited immigrant is generally the detention of the individual, these sections in effect authorise the detention of a person based on a suspicion in relation to that person's lawful association with others.

The effect of section 33(1)(i) and (p) of the Citizenship and Migration Act is the establishment of wide-ranging restrictions on the people with whom a person can associate without being liable to be declared a prohibited immigrant. Since section33 (1) fails to take into account the nature of the suspected association or the nature of the suspected criminal conduct, this restriction goes far beyond any encroachment on freedom of association that may be justified in order to prevent criminal activity.[31]

These provisions are neither reasonable nor proportionate curtailment of the right to freedom of association. They are so broad as to be able to cover a range of circumstances where there is no appreciable risk to Kenyan society. For example, the provision would cover instances where a person was, but is no longer, a member of a group or organisation that is involved in criminal activities. Similarly, it would cover members of an organisation that committed criminal conduct many years ago, but is no longer involved in any criminal activity.

[31]My opinion is that something beyond mere membership and innocent association is required to judge whether a person should be declared a prohibited immigrant. For example, the Act could make it clear that association or membership requires that 'the person was sympathetic with or supportive of the criminal conduct':

This broadening of 'reasonable cause', beyond considering whether the group or person has been involved in criminal activity, heightens the risk of unnecessary curtailment on a person's freedom of association.

It has emerged in the discussion above that numerous laws interfere with freedom of association, including restricting the ability of certain classes, groups or organisations of persons involved, or likely to be involved in crime. The Bill of Rights at Article 24 allows for limits on most rights, but the limits must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'

What follows is a suggestion of some of the principles and criteria that might be applied to help determine whether a law that interferes with freedom of association is justified, including those under international law.

### 5.3.2. Legitimate objectives

Both Article 24(1) and international Human Rights law recognise that freedom of association can be restricted in order to pursue legitimate objectives such as the protection of public safety and public order.

In considering how restrictions on freedom of association may be appropriately justified, one starting point is international Human Rights law, and the restrictions permitted by the ICCPR. Article 22(2) of ICCPR provides that no restrictions may be placed on the exercise of the right to freedom of association with others, other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public

safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.[32]

Many of the laws discussed above pursue these objectives. For example, many criminal laws, clearly protect the rights of other people and public order by preventing people from 'getting together to hatch crimes' and is considered one justification for restrictions on freedom of association.[33]

There is a 'public interest' in restricting the activities, or potential activities, of criminal associations and criminal organisations so that legislative encroachments on freedom of association are not uncommon where the legislature aims to prevent crime. For example the Prevention of Organised Crimes Act No 6 of 2010 does not introduce novel or unique concepts into the law in so far as it is directed to the prevention of criminal conduct by providing for restrictions on the freedom of association of persons connected with organisations which are or have been engaged in serious criminal activity.[34]

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[32]*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 22(2).

[33]Professors Campbell and Whitmore wrote, concerning vagrancy laws, that 'New South Wales in 1835 was still a penal colony and one can understand why at that time it should have been thought necessary to prevent people getting together to hatch crimes': Enid Campbell and Harry Whitmore, *Freedom inAustralia* (Sydney University Press, 1966) 135. This was quoted in *Tajjour v New South Wales*(2014) 313 ALR 221, [8] (French CJ).

[34]To the extent that it has the objective to disrupt and restrict the activities of organisations involved in serious crime and their members and associates and to protect the public from violence associated with such organisations.

Limits on free association are also sometimes said to be necessary for other people to enjoy freedom of association and assembly so that laws that facilitate the freedom of assembly of some may need to inhibit the freedom of assembly of others, for example by giving police certain powers to control or regulate public protests.

Under the Public Order Act No 26 of 1950 Freedom of Association is limited by provisions that regulate protests, perhaps aimed at ensuring the protests are peaceful and do not disproportionately affect others. Protest organisers are therefore required to notify police in advance, so that police may prepare, for example by cordoning off public spaces.

### 5.3.3. Proportionality

Even if a law does pursue such an objective, it will also be important to consider whether the law is suitable, necessary and proportionate. The recognised starting point for determining whether an interference with freedom of association is justified is the international law concept of proportionality. In art 22 of the ICCPR, the phrase 'necessary in a democratic society' is seen to incorporate the notion of proportionality.

Under Article 24(1) proportionality finds expression in the requirement to take into account all relevant factors including-

(*a*) the nature of the right or fundamental freedom;

(*b*) the importance of the purpose of the limitation;

(*c*) the nature and extent of the limitation;

(*d*) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(*e*) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

### 5.4 Article 32: Freedom of conscience, religion, belief and opinion[35]

Freedom of conscience, religion, belief and opinion is a principle that supports the freedom of an individual or community in public or private, to manifest religion or belief in teaching, practice, worship and observance. It also includes the freedom to change one's religion or belief.[36]

This freedom is infringed when a law prevents individuals from practicing their religion and belief or requires them to engage in conduct which is prohibited by their religion or belief.[37] Alternatively, the freedom will also be infringed when a law mandates a particular religious practice.

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[35]Article **32.** (1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.
(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief through worship, practice, teaching or observance, including observance of a day of worship.
(3) A person may not be denied access to any institution, employment or facility, or the enjoyment of any right, because of the person's belief or religion.
(4) A person shall not be compelled to act, or engage in any act, that is contrary to the person's belief or religion.
[36]The Universal Declaration of Human Rights.The United Nations.
[37]Peter Radan, Denise Meyerson and Rosalind Croucher (eds), *Law and Religion* (Routledge, 2005) ch 4.

In international law Article 18 of the *Universal Declaration of Human Rights* enshrines freedom of religion:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.[38]

The ICCPR provides in art 18(i) that 'everyone shall have the right to freedom of thought, conscience and religion'.[39]

The United Nations Human Rights Committee has explained that the infringement of a person's rights under art 18 will often engage a number of other rights and freedoms protected in the ICCPR, including the right to privacy,[40] the rights to hold opinions and freedom of expression,[41] the right of peaceful assembly,[42] and liberty of movement.[43]

Some counter terrorism laws[44] in the area of national security may be characterised as interfering with freedom of conscience, religion, belief and

[38]*Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd PlenMtg, UN Doc A/810 (10 December 1948) art 18.
[39]*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1).
[40]Ibid Art 17
[41]Ibid Art 19
[42]Ibid Art 21
[43]Ibid Art 12
[44]The Prevention of Terrorism Act 30 of 2012

opinion because they may restrict religious expression. These laws include the following:

Section 9A[45] which creates the offence of 'advocating terrorism'. This may be seen to limit religious expression by limiting the capacity of individuals to express religious views which might be radical and controversial;

Sections 2 and 3[46] which provides that an organisation maybe prescribed as a terrorist organisation, making it an offence to be a member of that organisation, to provide resources or support to that organisation, or to train with that organisation. This provision risks criminalising individuals for expressing radical, religious beliefs; and section 24[47] makes it an offence to associate with a proscribed 'terrorist organisation'. There may be interference with religious freedom where a person is seen to associate with a member of a terrorist organisation who attends the same place of worship or prayer group. Where also, the association is in a place being used for public religious worship and takes

[45] 9A. Facilitation of terrorist acts: A person who advocates, promotes, advises or facilitates with intent to commit a terrorist act, any act preparatory to a terrorist act, commits an offence and is liable, on conviction to imprisonment for a term not exceeding twenty years.
[46] S. 2 **"terrorist group"** means—(a) an entity that has as one of its activities and purposes, the committing of, or the facilitation of the commission of a terrorist act; or
(b) a specified entity;
S. 3 (1) Where the Inspector-General has reasonable grounds to believe that—
(a) an entity has—(i) committed or prepared to commit;
(ii) attempted to commit; or
(iii) participated in or facilitated the commission of, a terrorist act; or
(b) an entity is acting –
(i) on behalf of;
(ii) at the direction of; or
(iii) in association with, an entity referred to in paragraph (a), he may recommend to the Cabinet Secretary that an order be made under subsection (3) in respect of that entity.
[47] A person who is a member of, or professes to be a member of a terrorist group commits an offence and is liable, on conviction, to imprisonment for a term not exceeding thirty years.

place in the course of practising a religion, this may place a significant burden on defendants to prove that their association arose in the course of practising their religion.[48]

These provisions raise concerns about the effect of the Prevention of Terrorism Act on freedom of conscience and religion because it limits the capacity of individuals to express religious views which might be radical and controversial. The law is likely to have a 'significant chilling effect' on religious expression, as individuals may refrain from discussing their religious views out of fear they will be prosecuted.

On limitation it is generally recognised that freedom of religion is not absolute.[49] Instead, 'it is subject to powers and restrictions of government essential to the preservation of the community'.[50] Legislatures and the courts often have to strike a balance between 'equality' rights like anti-discrimination, and other freedoms like freedom of conscience and religion.

An amicus brief by several legal academics to the US Supreme Court case of *Obergefell v Hodges,*[51] where a majority of that Court upheld the constitutional

[48]See Section 12D A person who adopts or promotes an extreme belief system for the purpose of facilitating ideologically based violence to advance political, religious or social change commits an offence and is liable on conviction, to imprisonment for a term not exceeding thirty years.
[49]See Article 25 Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—
(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
(b) freedom from slavery or servitude;
(c) the right to a fair trial; and
(d) the right to an order of habeas corpus.
[50]*Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 149 (Rich J).
[51]*Obergefell v odges*576 US (June 26, 2015).

validity of state-based same-sex marriage legislation, canvassed an argument in favour of balancing different—sometimes competing—rights and interests:

The Court must protect the right of same-sex couples to marry, and it must protect the right of churches, synagogues, and other religious organizations not to recognize those marriages. This brief is an appeal to protect the liberty of both sides in the dispute over same-sex marriage … No one can have a right to deprive others of their important liberty as a prophylactic means of protecting his own … The proper response to the mostly avoidable conflict between gay rights and religious liberty is to protect the liberty of both sides.[52]

Having said this, the law provides no significant guidance on the limits of freedom of conscience, religion, belief and opinion in Kenya. This issue is examined below under legitimate objectives and proportionality.

### 5.4.1. Legitimate objectives

In considering how restrictions on freedom of conscience or religion may be appropriately justified, one starting point is the ICCPR. Article 18(3) provides that freedom of religion may be limited where it is 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.

[52] Douglas Laycock, 'Brief of Douglas Laycock, Thomas Berg, David Blankenhorn, Marie Failinger and Edward Gaffney as Amicus Curiae in Support of Petitioners in Same-Sex Marriage Cases (Obergefell v Hodges Etc)' [2015] Public Law and Legal Research Paper Series 1–2.

The UN Human Rights Committee has strictly interpreted art 18(3), indicating that general public interest criteria, such as national security concerns, may not be sufficient to justify interferences with religious freedom.[53]

Non-discrimination is one principle often advanced to justify laws that limit freedom of religion. The question therefore still remains whether laws that interfere with freedom of religion may be justified if they advance the principle of non-discrimination? On this issue International human rights law provides some guidance on the relationship between religious freedom and non-discrimination. Article 4 of the ICCPR provides that some ICCPR rights may be derogated from in times of public emergency, however States Parties must ensure that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Anti-discrimination provisions in international human rights law may constitute and therefore point to a permissible limitation on religious freedom. Articles 2, 4, 21 and 26 of the ICCPR provide that the protection of individual's rights must not be 'without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, property birth or other status'.

[53]United Nations Human Rights Committee, General Comment No 22 (1993) on Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion, CCPR/C/21/Rev.1 [8].

### 5.4.2. Proportionality

Is it justified to adopt a proportionality test when assessing appropriate limitation on freedom of conscience and religion? In terms of Article 24(1) limitations are reasonable where 'only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

Daniel Black also promoted the use of a proportionality approach to reconcile laws that require a balance between freedom of religion and other rights. He was highly critical of the justificatory processes employed by relevant parliamentary committees and government departments, arguing that an adequate level of analysis isn't always being provided by departments (including the Attorney-General's department) putting forward human rights compatibility statements in a much more broadly considered approach (as per the APS code of conduct). Rather the current approach seems to avoid controversial areas to push through legislation advocated by the government of the day.[54]

[54]D Black, *Submission 6*.ALRC Interim Report.

### 5.5. Article 33: Freedom of Expression.[55]

Freedom of expression is the political right to communicate one's opinions and ideas. It is one of the 'fundamental values protected by the constitution and as 'the freedom *par excellence*; for without it, no other freedom could survive'.[56]

A wide range of laws may be seen as interfering with freedom of expression, broadly conceived. Some of these laws impose limits on freedom of speech that have long been recognised by the law, for example, in relation to obscenity and sedition. Arguably, such laws do not encroach on the traditional freedom, but help define it. However, these traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.[57]

In terms of Article 33, freedom of speech is not absolute because it does not protect all speech. The difficulty is always balancing the respective rights or objectives. It is difficult to draw a line between speech which might appropriately be regulated and speech which in any liberal society should be tolerated. Article

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[55] Article **33.** (1) Every person has the right to freedom of expression, which includes—
(*a*) freedom to seek, receive or impart information or ideas;
(*b*) freedom of artistic creativity; and
(*c*) academic freedom and freedom of scientific research.
(2) The right to freedom of expression does not extend to—
(*a*) propaganda for war;
(*b*) incitement to violence;
(*c*) hate speech; or
(*d*) advocacy of hatred that—
(i) constitutes ethnic incitement, vilification of others or incitement to cause harm; or
(ii) is based on any ground of discrimination specified or contemplated in Article 27 (4).
(3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.

[56] Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.

[57] In fact, freedom of speech has been said to represent the 'limits of the duty not to utter defamation, blasphemy, obscenity, and sedition': Glanville Williams, 'The Concept of Legal Liberty' [1956] *Columbia Law Review* 1129, 1130.

24(1) allows for limits on most rights, but the limits must generally be reasonable, prescribed by law, and 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

There is considerable disagreement about the appropriate scope of the freedom. Professor Adrienne Stone observed that the 'sheer complexity of the problems posed by a guarantee of freedom of expression' makes it unlikely that a single 'theory' or 'set of values' might be appropriate in resolving 'the entire range of freedom of expression problems'.[58] However, the dominant alternative approach is to use a proportionality test since it is the accepted test for justifying most limitations on rights. For example in its examination of legislation the court should ask whether a limitation is aimed at achieving a legitimate objective; whether there is a rational connection between the limitation and that objective; and whether the limitation is proportionate to that objective.

### 5.5.1. Legitimate objectives

Article 33 and international law recognise that freedom of speech can be restricted in order to pursue legitimate objectives such as the protection of reputation and public safety. In its consideration of legitimate objectives the court should simply ask whether a limitation of freedom of speech is aimed at

[58]Adrienne Stone, 'The Comparative Constitutional Law of Freedom of Expression' (2010), *University of Melbourne Legal Studies Research Paper*, No 476 21.

achieving a 'legitimate objective of promoting or protecting the rights of others'[59]—a quite open category of limitation.

However, in considering how restrictions on freedom of speech may be appropriately justified, one starting point is international human rights law, and the restrictions permitted by the ICCPR.

The ICCPR states that the exercise of freedom of expression 'carries with it special duties and responsibilities':

It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.[60]

Many of the laws pursue these objectives. For example, many of the criminal laws—and incitement offences—clearly protect the rights of others, including the right not to be a victim of crime. Some criminal laws, such as counterterrorism laws, are concerned with the protection of national security or public order. The Siracusa Principles define 'public order', as used in the ICCPR, as 'the sum of

[59]Article 33(3) (3) In the exercise of the right to freedom of expression, every person shall respect the rights and reputation of others.
[60]*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3).

rules which ensure the functioning of society or the set of fundamental principles on which society is founded'.[61]

### 5.5.2. Proportionality

Whether laws in fact pursue legitimate objectives of sufficient importance to warrant restricting speech may be contested. However, even if a law does pursue such an objective, it will be important to also consider whether the law is suitable, necessary and proportionate.

In relation to justifications for limiting freedom of expression, the UN Human Rights Committee has stated:

> When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[62]

The UN Human Rights Committee has also observed that the principle of proportionality must take account of the 'form of expression at issue as well as the means of its dissemination'. For instance, the value placed on uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.

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[61]United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) cl 22. The Siracusa Principles also state that 'respect for human rights is part of public order'.

[62]United Nations Human Rights Committee, General Comment No 34 (2011) on Article 19 of the ICCPR on Freedoms of Opinion and Expression (CCPR/C/GC/34) [35].

The Australian Centre for Comparative Constitutional Studies has submitted that in applying the principles of proportionality to limitations on freedom of speech, regard should be had to the following:

- whether the law interfering with freedom of speech is 'content-neutral' or 'content-based';
- the extent to which the law interferes with freedom of speech including the availability of alternative, less restrictive means; and
- the nature of the affected speech.[63]

In relation to the first of these criteria, a content-based law aims to address harms caused by the content of the message communicated. Defamation laws, hate speech laws, laws regulating obscenity or pornography, and laws directed at sedition were given as examples of content-based laws.

In contrast, a content-neutral law is directed towards some other purpose unrelated to the content of expression. Laws directed to the 'time, place and manner' in which speech occurs such as laws that regulate protest—by requiring that protest be limited to certain places or times—laws that impose noise controls, or a law that limits the distribution of leaflets directed at preventing litter were given as examples of content-neutral laws.[64]

An enduring contestation is whether the proportionality doctrine which allows rights limitation analysis to consider each case on its own merits relative to

[63] ALRC Report; Centre for Comparative Constitutional Studies, *Submission 58*.
[64]ibid

circumstances is the appropriate approach. Proponents argue that over the years, Proportionality has become "a central feature of rights adjudication in liberal democracies worldwide."[65] According to Kumm, proportionality analysis is perhaps one of "the most successful legal transplants in the second half of the twentieth century."[66] The doctrine is characterized by others as "a universal criterion of constitutionality"[67] and yet others perceive it as "a foundational element of global constitutionalism."[68]

Yet there are fundamental objections against proportionality. It has been argued to dilute rights by implying that fundamental rights competed "on a par with any of the other interests that individuals or the government have."[69] Proportionality has also been argued to render the constitution "futile," since the protection granted depended on balancing fundamental rights and public interests in each case.[70] Therefore, he continues, balancing leads to a situation where fundamental rights are not protected effectively any more, and where

[65] Mattias Kumm, The Idea of Socratic Contestation and the Right to Justifi cation , 4 L AW & ETHICS HUM. RTS . 141, 142 (2010).
[66] Mattias Kumm, Constitutional Rights as Principles , 2 I NT ' L . J. CONST . L. (I·CON) 574, 595 (2004).
[67] David M. Beatty , The Ultimate Rule of Law 162 (2004).
[68] Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism , 47 COLUM . J. T RANSNAT ' L L. 72, 160 (2008).
[69] Stavros Tsakyrakis, Proportionality: An Assault on Human Rights? , 7 I NT ' L . J. C ONST . L. (I·CON) 471 (2010)
[70] Id . at 471, 470.

"everything" is up for grabs.[71] In his opinion, rights should rather be treated as "trumps" than as mere "private interests."[72]

At the heart of the objection to proportionality is the reasoning that a wide range of aims would be allowed to play out as competing interests in the process of balancing. Since rights and all public interests would compete at the same level, such rights would not have priority over competing considerations.[73]The obvious risk in all this is that constitutionally enshrined rights could be outweighed even by minor interests without constitutional status thereby depriving fundamental rights of their normative power.

### 5.6 Article 39: Freedom of movement and residence.[74]

Freedom of movement primarily concerns the freedom of citizens both to move freely within their own country and to leave and return to their own country. It is a human rights concept encompassing the right of individuals to travel from place to place within the territory of a country,[75] and to leave the country and

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[71] Id . at 489. For similar critique see GRÉGOIRE C. N. WEBBER , THE NEGOTIABLE CONSITUTION 101 (2009).

[72] Tsakyrakis, Proportionality , supra note 1, at 473, 470. Similar distinctions are made by Aileen McHarg, Reconciling Human Rights and the Public Interest , 62 M OD . L. R EV . 671, 673 (1999); Mattias Kumm, Political Liberalism and the Structures of Rights , in L AW , R IGHTS AND D ISCOURSE : T HE L EGAL P HILOSOPHY OF R OBERT ALEXY 131, 141 (George Pavlakos ed., 2007) [hereinafter Political Liberalism ]; Tor Inge Harbo, The Function of the Proportionality Principle in EU Law , 16 E UR . L.J. 158, 166–169 (2010).

[73] Mattias Kumm, Constitutional Rights as Principles , 2 I NT ' L . J. C ONST . L. 582(2004) Kumm Constitutional Rights , supra note 6, at 582; Kumm, Political Liberalism , supra note 16, at 139; Kumm, Socratic Contestation, T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing , 96 Y ALE L.J. 943, 945 et seq . (1987).

[74] Article 39. (1) Every person has the right to freedom of movement.
(2) Every person has the right to leave Kenya.
(3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.

[75]Jérémiee Gilbert, *Nomadic Peoples and Human Rights* (2014), p. 73: "Freedom of movement within a country encompasses both the right to travel freely within the territory of the State and the right to relocate oneself and to choose one's place of residence".

return to it. The right includes not only visiting places, but changing the place where the individual resides or works.[76] It has its origins in ancient philosophy and natural law, and has been regarded as integral to personal liberty.[77]

Freedom of movement, broadly conceived, may also be engaged by laws that restrict the movement or authorise the detention of any person—not only a citizen—lawfully within the territory of a state.

In international law, freedom of movement is widely recognised. For example, art 13 of the *Universal Declaration of Human Rights* provides:

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 12 of the *International Covenant on Civil and Political Rights* (ICCPR) provides, in part:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

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[76]Kees Groenendijk, Elspeth Guild, and Sergio Carrera, *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (2013), p. 206: "[F]reedom of movement did not only amount to the right to travel freely, to take up residence and to work, but also involved the enjoyment of a legal status characterised by security of residence, the right to family reunification and the right to be treated equally with nationals".

[77]Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a Personal Liberty' (2011) 12 *Melbourne Journal of International Law* 27, 6. See also Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) ch 4; Harry Street, *Freedom, the Individual and the Law* (Penguin Books, 1972) ch 11.

2. Everyone shall be free to leave any country, including his own.

...

4. No one shall be arbitrarily deprived of the right to enter his own country.

A wide range of laws may be seen as interfering with freedom of movement, broadly conceived. Some of these laws impose long recognised limits on freedom of movement and residence. These traditional limits are crucial to understanding the scope of the freedom, and possible justifications for new restrictions.

The objects of limitation on this freedom are to allow prohibitions and restrictions to be imposed for one or more of the following purposes:

a) protecting the public from a criminal act;

b) preventing the provision of support for or the facilitation of a criminal act; or

c) preventing the provision of support for or the facilitation of the engagement in a criminal activity in a foreign country.

This is common in restriction orders. Among the restrictions that may be placed on an individual subject to a restriction order is that they may be restricted from being in specified areas or places; prohibited from leaving Kenya; and required to remain at specified premises between specified times.

Many other criminal laws can be considered to interfere with freedom of movement, including those that allow for arrest, refusal of bail and for the

imprisonment of offenders. Traditional powers of arrest, and the jurisdiction of courts over bail and the sentencing of offenders are arguably matters that limit the scope of the traditional understandings of freedom of association, rather than interfering with the freedom.

Freedom of movement will sometimes conflict with other rights and interests, and limitations on the freedom may be justified, for example, for reasons of public health and safety.

Article 24 of the Constitution under the Bill of Rights allow for limits on most rights, but the limits must generally be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(*a*) the nature of the right or fundamental freedom;

(*b*) the importance of the purpose of the limitation;

(*c*) the nature and extent of the limitation;

(*d*) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(*e*) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

Some of the principles and criteria that may be applied to help determine whether a law that interferes with freedom of movement is justified, including those under international law are as follows:

### 5.6.1. Legitimate Objectives

Both Article 24(1) of the Constitution of Kenya and international Human Rights law recognise that freedom of movement can be restricted in order to pursue legitimate objectives such as the protection of national security and public health. Some existing restrictions on freedom of movement are a corollary of pursuing other important public or social needs.

In considering how restrictions on freedom of movement may be appropriately justified, one starting point is international Human Rights law, and the restrictions permitted by the ICCPR.

The ICCPR provides grounds for restrictions on freedom of movement in general terms. Article 12(3) of the ICCPR provides that freedom of movement shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Many of the laws discussed above pursue these objectives. For example, counter-terrorism and other criminal laws clearly protect the rights of others, including the right not to be a victim of terrorism or other crime. They are also are concerned with the protection of national security or public order.

Other counter-terrorism laws affecting aspects of citizenship, passports and border protection may also be necessary to protect legitimate national security and other interests. Some aspects of quarantine laws, such as quarantine zones, are necessary to protect public health.

A range of laws that restrict entry, for example, into military security zones, safety zones and accident sites may be necessary to protect legitimate objectives such as protecting public safety and health and ensuring public order.

### 5.6.2. Proportionality

The essence of Article 24(1)(a) to (d) as said before is proportionality so that even if a law does pursue a legitimate objective, it will be important also to consider whether the law is suitable, necessary and proportionate.

The United Nations Human Rights Committee has said that restrictions on freedom of movement 'must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed'.[78] The UN Committee has also said:

The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution … it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to

[78]United Nations Human Rights Committee, *General Comment No 27 (1999) on Article 12 of the Convention–Freedom of Movement*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [13]–[14].

the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.[79]

A range of Kenyan laws may be seen as interfering with freedom of movement as provided in the Constitution. However, some of these provisions relate to limitations that have long been recognised in law, for example, in relation to official powers of arrest or detention in criminal law, customs and quarantine. Further, while the Citizenship and Immigration Act by making provision for prohibited immigrants constrains the movement of people into Kenya.

### 5.7. Article 40: Protection of Right to Property

The Prevention of Terrorism Act[80] legislates a number of offences that have the effect of denying or limiting the enjoyment of the right to property under the constitution. The offences relate to collection or provision of property and services for commission of terrorist acts,[81] possession of property for commission of terrorist acts,[82] arrangements for the retention or control of terrorist property[83] and dealing in property owned or controlled by terrorist groups.[84]

[79]Ibid [13]–[14]. Legal and bureaucratic barriers were, for the Committee, a 'major source of concern': Ibid [17].
[80] Act no 30 of 2012.
[81] Section 5.
[82] Section 6.
[83] Section 7.
[84] Section 8.

The right to property or right to own property is often classified as a human right for persons regarding their possessions under Article 40. John Locke (1632–1704) celebrated property as a 'natural' right, advocating the protection of a citizen in 'his Life, Health, Liberty, or Possessions'.[85] Jeremy Bentham (1748–1832) continued the philosophical argument about property, anchoring it in laws:

Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.[86]

Many statutes have been enacted which limit property rights. How far can such interference can go, before it may be regarded, for example, as an 'arbitrary deprivation' 'limitation or restriction of enjoyment', in the language of the UDHR and Article 40(2)?

In terms of Article 40(3)(b) property rights could be encroached upon where such 'is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament', but even then subject to prompt payment in full, of just compensation to the person.

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[85]John Locke, *Two Treatises of Government*(Cambridge University Press, First Published 1690, 2nd Ed, Peter Laslett Ed, 1967) 289. The timing of the publication relevant to the negotiation of the ascension of William and Mary is explained by Peter Laslett, in ch III of his introduction to the *Two Treatises*.

[86]Jeremy Bentham, 'Principles of the Civil Code' in *The Works of Jeremy Bentham, Published under the Supervision of His Executor John Bowring* (1843) vol 1 pt I ch VIII 'Of Property', 309a. One of the main17th century arguments about property was whether it was founded in 'natural' or 'positive' law. Bentham is representative of the positivist approach that was the foundation of modern thinking about property.

In international law, Article 17 of the UNDHR provides:

(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.

Article 17 is reflected in art 5(d)(v) of the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD),[87] which guarantees 'the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law' in the exercise of a range of rights, including the 'right to own property alone as well as in association with others'.

A wide range of laws may be seen as interfering with property rights. Some apply to personal property, some to real property, and some to both. Examples of such laws are banking, taxation, personal property securities, intellectual property laws, criminal laws among others. These laws may be intended to limit land use to protect the environment, to balance competing private interests or for the public interest.[88] The most general justification for laws that interfere with vested property interests is that the interference is necessary and in the public interest.

The Bill of Rights provides exceptions to the right not to be deprived of property, provided the exception is reasonable, in accordance with the law, and/or subject

[87] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
[88] See Lee Godden and Jacqueline Peel, *Environmental Law* (Oxford University Press, 2010) ch 4.

to just compensation.[89] In terms of Article 40(3) criteria for justifying encroachments on property rights might be whether it is :

a) in accordance with Chapter Five (Land and Environment)

b) is for a public purpose or in the public interest

c) prompt payment in full of compensation

d) access to justice for person who has an interest

Further, the requirement for prompt payment in full of compensation operates to protect individual's property owners to ensure that they do not bear a disproportionate burden for the benefit of the community and to fairly balance private and public interests.

### 5.7.1. Proportionality

In applying the proportionality test to justify limitation of property rights, it is possible to borrow from the European model where it has been applied to determine whether interferences with real property rights caused by environmental laws are justified.

[89]See Article 40(3) (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
(*a*) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
(*b*) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
(i) requires prompt payment in full, of just compensation to the person; and
(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

Article 1 of Protocol 1 to the *European Convention on Human Rights* protects the right of Europeans to 'the peaceful enjoyment' of their 'possessions'. Further, it stipulates that 'no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.

The European Court of Human Rights has also heard a significant number of cases where a citizen has alleged that a State has unjustifiably interfered with—their right to property by taking measures to protect the environment.[90] There are a number of steps in the test for determining whether environmental legislation has unjustifiably interfered with property rights. With respect to the proportionality part of the test, which asks whether there was a 'reasonable relationship of proportionality between the means employed and the aim pursued', the Court in *Fredin v Sweden (No 1)* stated that States enjoy

> a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.[91]

[90]See, eg, *Hamer v Belgium* [2007] V Eur Court HR 73; *Papastavrou v Greece* [2003] IV Eur Court HR
257; *Pine Valley Developments Ltd v Ireland* (1991) 222 Eur Court HR (ser A); *Oerlemans v The Netherlands* (1991) 219 Eur Court HR (ser A);
[91]*Fredin v Sweden (No 1)* (1991) 192 Eur Court HR (ser A); *James v United Kingdom*(1986) 98 Eur Court HR (ser A).

## 5.8. Article 31: Privacy[92]

The petitioners challenged the provisions of Section 56 of SLAA which amended Section 42 of the NIS Act by repealing Part V and substituting it with a new part altogether. They asserted that the new part was likely to violate the right to privacy guaranteed under Article 31. The new part provided:

> (I) In this Part "special operations" means measures, efforts and activities aimed at neutralizing threats against national security.
>
> (2) Where the Director-General has reasonable grounds to believe that a covert operation is necessary to enable the Service to investigate or deal with any threat to national security or to perform any of its functions, the Director-General may, subject to guidelines approved by the Council, issue written authorization to an officer of the Service to undertake such operation.
>
> (3) The written authorization issued by the Director-General under subsection (2)- (a) shall be sufficient authorization to conduct the operation;
>
> (b) may be served on any person so required to assist the Service or facilitate the covert operation or investigations required to be undertaken;
>
> (c) may authorize any member of the Service to obtain any information, material, record, document or thing and for that purpose-
>
> (i) enter any place or obtain access to anything;
>
> (ii) search for or remove or return, examine, take extracts from, make copies of or record in any manner the information, material, record, documents or thing;
>
> (iii) monitor communication;
>
> (iv) install, maintain or remove anything; or
>
> (v) take all necessary action, within the law, to preserve national security; and
>
> (d) shall be specific and accompanied by a warrant from the High Court in the case of paragraph

[92] Article **31.** Every person has the right to privacy, which includes the right not to have—
(*a*) their person, home or property searched;
(*b*) their possessions seized;
(*c*) information relating to their family or private affairs
unnecessarily required or revealed; or
(*d*) the privacy of their communications infringed.

(c), and shall be valid for a period of one hundred and eighty days unless otherwise extended."

The petitioners also argued that Section 69 of SLAA infringed on the right to privacy as it allowed interception of communication by the National Security Organs. Section 69 of SLAA introduced Section 36A to the Prevention of Terrorism Act as follows:

> 36A (1) The National Security Organs may intercept communication for the purposes of detecting, deterring and disrupting terrorism in accordance with procedures to be prescribed by the Cabinet Secretary
>
> (2) The Cabinet Secretary shall make regulations to give effect to subsection (1) and such regulations shall only take effect upon approval by the National Assembly.
>
> (3) The right to privacy under Article 31 of the Constitution shall be limited under this section for the purpose of intercepting communication directly relevant in the detecting, deterring and disrupting terrorism.

The right to privacy is guaranteed under Article 31 of the Constitution and has also been expressly acknowledged in international and regional covenants on fundamental rights and freedoms. It is provided for under Article 12 of the UDHR, Article 17 of the ICCPR, Article 8 of the European Convention on Human Rights (ECHR) and Article 14 of the African Charter on Human and Peoples' Rights.

Surveillance in terms of intercepting communication or obtaining information as anticipated by sections 36A and 56 impacts upon the privacy of a person by leaving the individual open to the threat of constant exposure. This infringes on the privacy of the person by allowing others to intrude on his or her personal space and exposing his private zone. The SLAA to the extent that it sought to

limit the right to privacy in a free and democratic open society must have been such that it did not derogate from the core normative content of the right to privacy.

Article 24(1) sets out the conditions for possible limitations on the exercise of the right to privacy and determines the extent to which the right can effectively be enjoyed. The following section offers a step by step methodology for assessing the proportionality and conducting limitation analysis of laws that limit rights while providing guidance on the particular requirements stemming from Article 24(1).

### 3.8.1. Proportionality

Article 31 of the Constitution enshrines the fundamental right to privacy of the person. The right is not absolute and may be limited, provided that the limitations comply with the requirements laid down in Article 24(1). To be lawful, any limitation to the exercise of the fundamental rights protected by the Constitution must comply with the criteria, laid down in Article 24(1).

This list of criteria set out in Article 24(1) that are required during limitation analysis are as follows:

1. First it must be examined whether the law that provides for a limitation is accessible and foreseeable. The expression “by law” within the meaning of Article 24(1) requires, firstly, that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in

question, requiring that it should be accessible to the person concerned, who must, moreover, be able to foresee its consequences for him, and compatible with the rule of law.[93] Such law should be clear and precise and its application should be foreseeable to persons subject to it. If this requirement is not satisfied, then the measure is unlawful and there is no need to proceed further with its analysis.

2. Secondly, it must be examined whether the right is reasonable and justifiable. If it is not, the measure is unlawful and there is no need to proceed further with the assessment of its compatibility with the rules set in Article 24(1) of the Constitution.
3. Third, it must be examined whether the measure meets not a private but an objective of general interest. The objective of general interest provides the background against which the necessity of the limitation may be analysed.

[93] - On the notion of "foreseeability" in the context of interception of communications, see ECtHR case, *Zakharov v Russia*, para. 229: "The Court has held on several occasions that the reference to "foreseeability" in the context of interception of communications cannot be the same as in many other fields. Foreseeability in the special context of secret measures of surveillance, such as the interception of communications, cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly. However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident. It is therefore essential to have clear, detailed rules on interception of telephone conversations, especially as the technology available for use is continually becoming more sophisticated. The domestic law must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures." (emphasis supplied) In the same sense, most recently, see *Big Brother Watch and others v United Kingdom*, ECtHR, 13 September 2018, para. 306.

4. The following step consists of assessing the necessity of a proposed legislative measure which entails an analysis of available data to support the legislation.

If the above four tests are satisfied, it is ultimately time for the proportionality test to be applied. Proportionality in a broad sense encompasses both the necessity and the appropriateness of a measure, that is, the extent to which there is a logical link between the measure and the objective pursued. For a measure to be proportionate, the advantages resulting from the measure should not be outweighed by the disadvantages. Proportionality therefore "restricts the authorities in the exercise of their powers by requiring a balance to be struck between the means used and the result reached".[94]The sum effect is that the discretionary power of the legislator is constrained when restricting fundamental rights depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Constitution, the nature and seriousness of the interference and the object pursued by the interference.

The impugned legislation must lay down clear and precise rules governing its scope and application while imposing minimum safeguards so that the persons whose privacy has been impacted have sufficient guarantees to effectively protect against the risk of abuse.

[94] K. Lenaerts, P. Van Nuffel, European Union Law, Sweet and Maxwell, 3rd edition, London, 2011, p. 141 (case C-343/09, Afton Chemical, para. 45

### 3.8.2. Necessity

Necessity implies the need for an assessment of the effectiveness of the measure for the objective pursued and of whether it is less intrusive compared to other options for achieving the same goal. The necessity test should be considered as the first step with which a proposed measure involving the processing of personal information must comply. Should the draft measure not pass the necessity test, there is no need to examine its proportionality. A measure which is not proven to be necessary should not be proposed unless and until it has been modified to meet the requirement of necessity: in other words, necessity is a pre-condition for proportionality. It is therefore to be assumed that only a measure proved to be necessary should be assessed under the proportionality test.

Another factor to be considered is the effectiveness of existing measures over and above the proposed one. If measures for a similar or the same purpose already exist, their effectiveness should be systematically assessed as part of the proportionality assessment. Without such an assessment of the effectiveness of existing measures pursuing a similar or the same purpose, the proportionality test for a new measure cannot be considered as having been duly performed.

### 5.9. Articles 49, 50, 51 Article Fair trial

Articles 49, 50 and 51 of the Constitution respectively, provide for the rights of arrested persons, the rights to a fair hearing and, finally, rights of persons detained, held in custody or imprisoned. The petitioners and the interested parties supporting the petition argued that SLAA was completely inconsistent

with these Articles. Article 25 expressly makes it one of the four (4) non derogable rights. Article 24 of the Constitution allows for limitation of rights, and sets out the circumstances under which such limitations are permissible in a democratic society. However, as the right to fair trial is non-derogable, should a Court find that the provisions of SLAA limit the right, then *ipso facto*, such limitations will be found to be unconstitutional. Under the circumstances it becomes unnecessary to proceed to limitation analysis.

### 5.10. Article 39: Freedom of Movement and Residence[95]

Freedom of movement primarily concerns the freedom of citizens both to move freely within Kenya and to leave and return to the country. It has its origins in ancient philosophy and natural law, and has been regarded as integral to personal liberty.[96]

The petitioners have challenged Section 47 of SLAA which introduces Section 14(c) of the Refugee Act. They submitted that it violates Article 39 of the Constitution of Kenya which provides for freedom of movement. The right to freedom of movement is not one of the absolute rights under Article 25 of the Constitution. It can be limited under Article 24(1). More importantly, however,

[95] **39.** (1) Every person has the right to freedom of movement.
(2) Every person has the right to leave Kenya.
(3) Every citizen has the right to enter, remain in and reside anywhere in Kenya.
[96] Jane McAdam, 'An Intellectual History of Freedom of Movement in International Law: The Right to Leave as a personal Liberty' (2011)12 Melbourne Journal of International Law 27, 6. Harry Street, Freedom, the Individual and the Law (Penguin Books, 1972) ch 11.

Article 39 contains an inherent limitation-the right to enter, remain and reside anywhere in Kenya is guaranteed to citizens.

Section 47 of SLAA amended the Refugee Act by inserting a new paragraph after paragraph b – which states that a refugee shall "*not leave the designated refugee camp without the permission of the Refugee Camp Officer."*

Subject to the Constitution, the legislature may make such laws as it may deem necessary affecting the going and coming of citizens. But in the interpretation of those laws it must be assumed that the legislature did not intend to deprive any citizen of the right after absence to re-enter Kenya unless it has so enacted by express terms or necessary implication. In international law freedom of movement is widely recognised. For example, art 13 of the Universal Declaration of Human Rights provides:

> (1) Everyone has the right to freedom of movement and residence within the borders of each state.
>
> (2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 12 of the International Covenant on Civil and Political Rights (ICCPR) provides, in part:

> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> 2. Everyone shall be free to leave any country, including his own.
>
> …

5. No one shall be arbitrarily deprived of the right to enter his own country.

A wide range of laws have the effect of infringing freedom of movement, broadly conceived. Some of these laws that prohibit or constrain the movement of individuals include:

a) criminal laws;
b) immigration laws;
c) citizenship and passport laws;
d) environmental regulation; and
e) laws restricting entry to certain areas.

Article 24(1) allows for limitation of the right of movement, but the limits must generally be reasonable, prescribed by law, and 'demonstrably justified in a free and democratic society'. As discussed previously, proportionality is the accepted test for justifying most limitations on rights, and is used in relation to freedom of movement.

### 5.10.1 Legitimate objectives

Both statute law and international human rights law recognise that freedom of movement can be restricted in order to pursue legitimate objectives such as the protection of national security and public health.

In considering how restrictions on freedom of movement may be appropriately justified, one starting point is international human rights law, and the restrictions permitted by the ICCPR which provides grounds for restrictions on

freedom of movement in general terms. Article 12(3) of the ICCPR provides that freedom of movement

> shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

Many of the laws discussed in SLAA pursue these objectives. For example, counter-terrorism and other criminal laws clearly protect the rights of others, including the right not to be a victim of terrorism or other crime. They are also are concerned with the protection of national security or public order.

Counter-terrorism laws affecting aspects of citizenship, passports and border protection were also said to be necessary to protect legitimate national security and other interests. Some aspects of quarantine laws, such as quarantine zones, are also necessary to protect public health.

### 5.10.2. Proportionality

After proof that the impugned law pursues a legitimate objective, next will be consideration whether the law is necessary and proportionate.

Restrictions on freedom of movement 'must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed'.[97] The UN Committee has also said:

[97] United Nations Human Rights Committee, General comment No 27 (1999) on Article 12 of the Convention -Freedom of Movement, UN Doc CCPR /C/21/Rev.1/Add.9(2nd November 1999) [13]-[14].

> The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution … it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.[98]

## 5.11. Conclusion

The principle of proportionality has been incorporated in Article 24(1) which demands that limitation of rights be proportionate in relation to the legitimate purpose pursued and reflect at all stages of the processing a fair balance between all interests concerned, whether public or private, and the rights and freedoms at stake. At the core of the notion of proportionality lies the concept of a balancing exercise: the weighing up of the intensity of the interference vs the importance of the objective achieved in the given context. A well-performed test requires the express identification, and structuring into a coherent framework, of the different elements upon which the weighting depends, in order to be complete and precise. Hence, the clarity of the measure restricting the fundamental rights is a precondition for the identification of the intensity of the interference.

This chapter has considered select rights that were impacted in SLAA and which regularly impact national security. Also discussed is how they relate to human

[98] Ibid.

rights in international treaties and the bill of rights and the extent if any to which Parliament interferes with them through laws that encroach .The chapter has also analysed the extent to which the freedoms require particular scrutiny and justification and, if so, how this might be done.

# CHAPTER SIX

# CONCLUSION AND RECOMMENDATIONS

## 6.1 Introduction

This thesis has sought to outline in previous chapters a variety of areas where issues touching on national security end up before the judiciary leading to the predictable argument of judicial interference in executive functions. There is no immediate prospect of this trend going away – even though both the Executive and the Judiciary have a great many other pressing concerns. If that is right, then such encounters between the Executive and the Judiciary are likely to continue, posing checks and balances challenges for both arms of government as they each perform their vital roles. Neither a magic wand nor an instant solution is available. The project therefore returns to the theme expressed in Chapter One – the absence of and desirability of a judicial, constitutional or statutory framework for judicial review of executive conduct on matters of national security. With this aim in mind, the project revisits the challenge identified in Chapter One as facing the Executive and the Judiciary.

The challenge for this project is to fashion an approach which preserves the essential institutional integrity that is fundamental to the operations of executive agencies in matters of national security, while at the same time recognising that they must operate within a legal framework presided over by the Judiciary. Within that framework, it must be accepted that the Executive, no matter how hallowed, will in individual cases be treated no less favourably but also no more

favourably than any other litigant; that is not because of any hostility or lack of understanding on the part of the Judiciary –but because it is the essential ingredient of the judicial oath and of the rule of law.[1]

The part that follows is a summary of the chapter contents as a build up to this conclusion and recommendations.

### 6.2. Chapter Summary

Chapter One was dedicated to an introduction of the relationship between judicial review, constitutional supremacy and separation of powers. The chapter identified judicial review powers under Article 165(3) of the Constitution of Kenya as a novel construct without home grown precedent. The chapter identified and discussed the challenge of balancing executive claims of national security on one hand and constitutionally enshrined rights and liberties on the other. There is no established precedent in judicial review for the judiciary to balance individual rights against the need for national security in the new constitutional dispensation. The arguments that have been advanced generally against and in support of limiting individual rights in matters of national security identifies the problem as one of a missing judicial, constitutional and statutory model for the adjudication of matters touching on national security. The chapter set out the research questions, objectives, aims, a brief literature review and document

[1] See Constitution of Kenya 2010 Third Schedule (Articles 74, 141 (3), 148 (5) and 152(4)) National Oaths and Affirmations Oath.

analysis and justifications of the study. The last part of the chapter discussed the methodology to be employed and set out the structure of the thesis.

Chapter One having identified the problem of judicial review of national security matters under Article 165(3) as being without judicial, constitutional or statutory model, Chapter Two was therefore dedicated to the conceptual framework by first, constructing, clarifying and distinguishing various types of judicial review and definitional problems and second, integrating within the thesis and analysing foundational concepts such as separation of powers, rule of law and national security. These are key concepts that were central to an understanding of the judicial role in reviewing executive competence in national security decisions. Explanations of key concepts such as jurisdiction, justiciability and judicial interpretation were included so as to locate them within context in judicial review of national security decisions. Also identified were the source of authority for judicial review as well as significance and scope of judicial review generally.

Chapter Three interrogated the Security Laws (Amendment) Act No 19 of 2014 which provided a powerful tool to the state to be able to combat terrorism and to protect the well-being of its citizens and their property. It was argued that although various safeguards were included in the Act, some of these measures surpassed certain rights protected under the Constitution and the Bill of Rights in particular. The chapter discussed how the court handled conflicts of interest

between the Act and the Constitution by analytically addressing the following questions:

i. How the judiciary balanced national security and Human Rights while striking out sections of the Security Laws (Amendment) Act No. 19 of 2014,

ii. What informed the judiciary in doing what it did?

iii. Was the judiciary justified in taking the position that it did?

iv. Did the judiciary have the democratic legitimacy to take the position that it did?

v. Are Human Rights more important than national security or vice versa?

vi. Are there any problems that are likely to arise as a result of this stance taken by the judiciary?

vii. What are the experiences elsewhere? This part conducted an analysis of constitutional rights vs. executive interest in protecting national security in Kenya, Canada and the Republic of South Africa in order to determine whether balancing Human Rights and national security are better served by one particular model rather than another.

The chapter concluded that Article 24(1) by introducing a "culture of justification" in the Constitution where any act that limits a Constitutional right must be objectively *justifiable*, had lowered the threshold for judicial review of executive conduct in matters of national security.

Chapter Four showed how an upside down understanding of the institution of judicial review reinforced the democratic credentials of judicial review and lowered the threshold for judicial review of executive conduct in matters of national security. This chapter also found that Article 24(1) must transform court practice in judicial review of national security matters through a complete overhaul of judicial discretion and deference doctrine. This requires a migration from the traditional *Wednesbury* rationality to Article 24(1) justifiability.

The chapter also argued that the doctrine of deference by curtailing the freedom of courts to interrogate executive conduct in matters of national security posed a threat to the new constitutional order. Many justifications for a vigorous judicial review of executive conduct in national security matters are enumerated with suggestions for some possible improvements that would increase the judiciary's democratic responsiveness while not depriving it of the institutional characteristics that make it the superior mechanism for enforcement of the Constitution.

Chapter Five examined rights that were impacted by the SLAA case and which are regularly applied by the executive in national security matters that have a tendency to encroach upon human rights. The purpose of examining the laws was to ascertain whether they require particular scrutiny and justification and if so how the judiciary might do this —by applying what standard and following what type of process.

### 6.3. Recommendations

Continued reliance on *Wednesbury* principles in judicial review of national security is inconsistent with the letter and spirit of Article 24(1) of the Constitution. The inconsistency and failure to appreciate the full impact of Article 24(1) reflects unarticulated differences in the appropriate methods of judicial review of national security matters. The failure by the courts to explicitly expound its underlying approach to review of executive power where national security is pleaded and absence of any discussion of the merits of alternative approaches, has led to confused, inconsistent decisions. This has in turn led to inconsistent decisions in lower courts, as different judges use different frameworks of review.

The following recommendations present an attempt to solve the problem of judicial review of national security by extracting from Articles 10(2), 20(4), 24(1) and proposing a framework with which to determine the extent to which the executive may limit rights and the extent to which the judiciary may override the executive.

#### 6.3.1. Article 10(2): National Values

It has been stated in Chapter Four that the constitution also presents a new constitutional order in Article 10.[2] National values and principles of governance provided for by this Article bind the courts whenever they apply or interpret the constitution and any law. These values and principles complement judicial

[2] Infra at pg 245.

interpretative principles. It is expected that Article 10(2) will offer initial guidance for balancing conflicting rights in that it embodies the values underlying the Constitution. These values make up the general framework, in addition to Article 24(1) within which balancing of rights should occur. Four key principles emerging from this article that must guide courts are:

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

Inherent in these values is a balancing of individual and group rights. The Article advances a vision of relational rights in which the equality of each person exists alongside overall social well-being. The dual focus on individual and social wellbeing sets in motion a consideration of the importance of both of these elements.

### 6.3.2. Article 20(4): Interpretive Principles

While Article 10(2) set the national values, Article 20(4) lays down interpretive principles for courts. These principles are valuable tools that may guide the process of balancing rights. The Article prescribes two broad interpretive principles that must be promoted:

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

A key aim of (a) is propagation of equality and the removal of discrimination within society. This section also envisions a balancing process in which individual and group rights coexist.

Part (b) by prescribing promotion of "the spirit, purport and objects of the Bill of Rights" suggests superiority of the Bill so that rights recognized in the Bill of Rights should be interpreted broadly, while legislated exceptions to the exercise of these rights should be interpreted narrowly. This means the court must consider the meaning of a right, conduct an analysis of its purpose and the interests it was meant to protect, and the context in which the right is asserted.

### 6.3.4. Article 24(1) The Limitation Article

The criteria contained Article 24(1) are the circumstances in which these exceptions allowing limitation will apply. Below are outlines of the parameters of the eligibility criteria that should guide courts in limiting rights. These criteria mediate between conflicting rights by providing courts with balancing guidelines.

#### a. The mechanics of Article 24(1)

Limitation of rights under Article 24(1) should be in two stages. First the applicant should demonstrate an infringement of a fundamental right. This will be done by showing the activity for which protection is sought falls within a

specific right and that the executive conduct complained of actually impedes that right.

Should the court find that the executive conduct impedes the right, it should then move to the next stage of calling upon the executive to justify the infringement. The executive may at this stage concede if it does not believe the infringement to be justified.

For the executive to successfully justify the infringement, it must be able to satisfactorily answer at least three questions that arise under Article 24(1). First, is the infringement 'reasonable'? Second, is the infringement 'justifiable in an open and democratic society based on human dignity, equality and freedom'? Third, does the infringement negate the 'essential content of the right'? To pass constitutional muster, the respondent must answer the first two questions in the affirmative and the third in the negative.

In answering the above questions, the respondent and the judge must both take into account and be guided by the factors listed in Article 24(1) (a)-(e).

The factors listed in article 24(1)(a)-(e) when taken into account should compel the courts to ask a number of questions which would provide a template for limitation analysis.

**b. "A right or fundamental freedom in the Bill of Rights shall not be limited except by law..."**

These words provide the first stage by requiring that conduct that infringes a right or fundamental freedom must be provided for in law so that the respondent must be able to point at a law that authorises the infringement. Where the infringement is not provided for in any law the court should not entertain any further argument in support, but instead proceed to dismiss the justification.

**c. ... "and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,..."**

These words provide the second stage and suggest that a court should in assessing reasonability and justifiability of an infringement should make comparison and find guidance in the laws, practices and judicial interpretations of other 'open and democratic societies' and not otherwise. In this the court should weigh competing values in 'those' and 'our' society having regard to their unique circumstances and thereafter make an assessment that is proportionate. The court should not adopt a rigid standard but rather a flexible, context sensitive approach on a case by case basis.

In weighing competing values as suggested above, the court should be guided by factors listed in 24(1)(a)-(e) as follows:

**d. "the nature of the right or fundamental freedom"**

This provision requires the court when conducting analysis to rank the right in order of importance. By so doing the court ensures that the objective of the

infringement is so overwhelming as to justify the infringement, the objective is no more restrictive of the right than is absolutely necessary and that the benefits of the infringement outweigh the burden on the subject of the infringement. The more important the right, the more the court should be convinced the justification for infringement is compelling.

**e. "the importance of the purpose of the limitation"**

This provision requires the court to identify the purpose of the limitation and appraise its importance. So as to identify the purpose the court has to revisit the overall purpose of the law, legislative history and the mischief it set out to cure. The court must then ascertain whether the purpose is sufficiently important to justify infringement of the right in 'an open and democratic society based on human dignity, equality and freedom'. The role of the court is to ensure that the infringement when it does take place is not inconsistent with the values of an open and democratic society based on human dignity, equality and freedom.

**f. "the nature and extent of the limitation"**

This provision requires the court to engage in a balancing act at several stages. First, the court must consider whether the infringement affects the core values underlying a right so that allowing it does not render the values that define the right redundant. Second, the court must visit the impact of the infringement on those affected by it so as to ascertain that the harm caused by it does not unduly overburden and infringe other rights due to the subject. Third, the court in determining the level of justification should consider the social status of the

subject to ascertain the impact of the infringement to ensure it is not disproportionate. Fourth, the court should consider whether the infringement is permanent or temporary and whether it is a total or partial infringement of the right in question.

**g. 'enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedom of others'**

This provision requires the court to define where the rights of the individual interface with the rights of the larger society. The court must be able to decide whether it is better to uphold the rights of the individual or uphold the rights of the larger society since rights come with responsibilities. Where enjoyment of individual rights come with infringement of the rights of others, the court has to balance which of the two it will prioritise. In the case of national security, the court has to be able to uphold individual rights over the right to national security or vice versa by interrogating the potential pitfalls to the individual on one hand and the society on the other hand of its decision

**h. "the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."**

A court should ensure that a limitation is tailored to achieve its purpose by ensuring that the infringement is least restrictive of the affected right. The court must call upon the infringing party to prove that the objective could not be achieved by a provision applying to a narrower range of activities as a opposed to a blanket ban. Given two or more alternative ways of furthering the purpose

of an infringement more effectively, the court must settle for the one that infringes the right less intensively.

These then are the recommendations which if adopted by the courts would provide a template founded on the constitution, but refined by the courts through interpretation, for judicial review of executive conduct in matters of national security. In the long term, Parliament may consider legislating this template to better refine the process of judicial review.

### 6.4. Conclusion

This thesis has endeavored to answer a number of questions such as the question what is the nature and scope of executive power in matters of national security by examining the first the margins of executive authority and distinguishing different kinds of judicial review and the nature of the concept of national security. It then discussed examples of case law exhibiting how the Kenyan judiciary has struggled to find a balance in the exercise of executive power in matters of national security, human rights while addressing legitimacy concerns about judicial review.

While addressing the question of what limits and remedies are available to check the exercise of judicial review of executive power in matters of national security it revisited the SLAA case in which it failed to identify a predictable pattern of rights limitation analysis confirming the hypothesis of a non-existent template for judicial review of executive conduct in national security matters.

Ultimately the question whether judicial review is a necessary and effective way to measure and control the exercise of executive power in matters of national security is answered by the provisions of Articles 10(2), 20(4) and 24(1).

Article 24(1) has introduced in our rights limitation jurisprudence the twin elements of justification and proportionality as the fundamental doctrines that should guide the judiciary whenever it has to balance constitutional rights and national security interests. In recommending a template for judicial review, this thesis concludes that the twin doctrines of proportionality and justification provide the jurisprudential framework.

Article 24(1) in mandating justification, requires the Executive to give reasons for all of its actions in that it must show the rationality and reasonableness of it's actions and the tradeoffs they necessarily entail. The doctrine of proportionality, which institutionalizes a right to justification finds a home in a culture of justification.

In conclusion and revisiting the hypothesis on lack of a model for judicial review of national security matters, this thesis has illustrated how judicial review and its institutional features are able to influence executive conduct. This systematic comparative study has closed this lacuna through a thorough reflection on the hypothesis and the separation of powers doctrine. The question whether Judicial review is a democratically legitimate institution to be able to countermand executive conduct in national security presents no clear-cut answer but the study focused more on the legitimacy of reconciling competing constitutional

values and the delegation of this task to the judiciary. The central reflection of this study was to justify such a delegation by the Constitution. By recommending these guidelines I hope this thesis has provided a partial solution to the problem of judicial review of executive conduct in matters of national security.

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